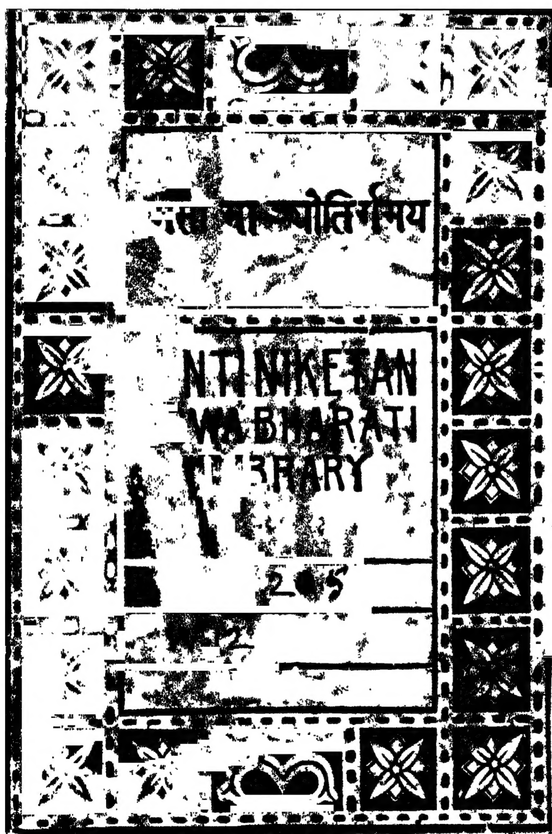


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ADMINISTRATION OF JUSTICE

DURING

THE MUSLIM RULE IN INDIA

Onauth Nauth Deb Prize Thesis for 1932

ADMINISTRATION OF JUSTICE
DURING THE
MUSLIM RULE IN INDIA

WITH

A HISTORY OF THE ORIGIN OF THE ISLÁMIC LEGAL INSTITUTIONS

BY

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PREFACE

In this little volume an attempt has been made to collect from the dusty records of the dim past, certain authentic facts and weave them into a connected history of the "Administration of Justice during the Muslim Rule in India." It is said that all history may roughly be divided into three portions as characterized by greater or less amount of authenticity and evidence. "Lowest of all is the legendary period; next is the semi-historical; and last, we come to history, properly so called, where the mass of the materials is authentic and contemporary."[1]

Fortunately for us we are spared the pains of going through the legendary and semi-historical tales and folklores, or through "the heavy woven garments of traditions and customs." We are in the full blaze of history dealing with the annals and accounts upon which Researches and Investigations have thrown a strong searchlight. To the great credit of the Muslim historians it must be said that they have recorded not only the rise and fall of dynasties and kingdoms, their wars and campaigns, their pomp and power; but faithfully noted the incidents in the lives of the kings and emperors, the manners and customs of the country, and the social and economic conditions of the people. It was the age of history when the Muslim kings and emperors ruled India, and we have contemporaneous records written by the court

[1] Elphinstone: "History of India" (Preface).

chroniclers and private historians describing the events and affairs of the State and depicting the incidents of the Palace.

The history of the Judicial System of India traced in this thesis, relates to the period covered by the Mediæval Age and extends up to the middle of the 18th century. The age had its ideals of justice and standards of punishment. In order to throw full light on the subject, I have divided the Muslim Rule in India into four periods:

(1) *The period of conquest and military occupation.*—From the Arab conquest of Sindh till the invasion of Sabuktagin (712-991 A.D.).

(2) *The period of successive invasions without any attempt to establish a government in India.*—From the death of Sabuktagin till the invasion by Muhammad Ghori (999-1206 A.D.).

(3) *The period of settled government with judicial tribunals.*—From the time of the Slave Dynasty till the death of Sher Shah (1206-1555 A.D.).

(4) *The period of well-established government with an extensive judicial and administrative machinery.*—From the Mughal Rule till the grant of the Diwáni (1556-1765 A.D.).

This plan has been adopted to convey a definite idea of the administration of justice of each period. From this it should not be understood that I have gone much beyond the scope of the subject selected by the

Calcutta University for the "Onauth Nauth Deb Research Prize" and Medal. The University limited the subject to the Mughal period only. While confining myself within the limit of the subject and avoiding what may appear to be a digression, I have made a rapid survey of the administration of justice during the pre-Mughal period without encumbering the main thesis with historical details. The reason is obvious. The Mughal system of the administration of justice was of slow growth; the judicial machinery was set up gradually and from time to time modified and improved upon what had existed in the pre-Mughal period. Consequently, it is deemed necessary that we should first of all know something of the Judiciary and the Judicial machinery that existed before the Mughal Rule. For this reason, I have given a very short description of the judicial system of the pre-Mughal period in Chapter II; while Chapter I deals with the model on which the Muslim judicial system of India was based, and gives an analysis, pointing out the extent of Muhammadan Law made applicable to the non-Muslims of India. Table I shows the grades of courts that existed at the period. This analysis, it is submitted, will be interesting and appreciative from the legal and historical point of view.

Synopsis of the Thesis.

Chapter III deals exclusively with the administration of justice during the reign of 'Akbar, and Table No. II points out the gradation of courts that existed in the Capital and the Provinces.

Chapters IV and V give an account of the judicial system during the reign of Akbar's successors, of the

dispensation of justice by the Emperors in person, and of the mode of trial held in the court of the Qáẓi; while Table No. III gives, in a bird's-eye view, the grades of tribunals with short notes on the powers and jurisdiction of the judicial officers.

Chapter VI deals with Appeal, Reference, Revision, Review of judgment, the Constitution of Courts and the Full Bench; while Table No. IV points out the grades of appellate courts in the Capital and the Provinces.

Chapter VII, Section I, deals exclusively with the administration of justice in the provinces, and Sections II and III with that in rural areas, as well as with the Socialistic functions; while Table No. V points out the gradation of courts that existed in Provinces only.

Chapter VIII deals with the administration of justice during the reign of Aurangzib's successors, *i.e.*, the later Mughals. It also gives an account of the judiciary and the tribunals that existed in the country at the time of the grant of the Diwáni in 1765. Thus the whole history of the administration of justice in India has been brought up to the period of the East India Company. Section III gives a comparative view of the Islámic courts and the British courts of justice, while Section IV points out the influences of the Mughal Rule on the present system of administration.

Chapter IX deals with the Islámic Adjective Law. The current Anglo-Muhammadan law books deal with that portion of law which is cognizable by the British courts of justice, but take no notice of the adjective law. The absence of a treatise dealing with

this portion of the Muhammadan law has given rise to certain misconceptions in the mind of many writers. One such misconception is that the Qáẓi used to decide cases by the laws of the Qurán only without any code of legal procedure. It is to be hoped that such misconceptions will now be removed. This chapter also throws light on such topics as the law of Estoppel, Limitation, *Res judicata*, etc., as well as on the question of court-fees and appointment of lawyers for conducting cases before the Islámic courts.

Chapter X deals with some important topics, *viz.*, (1) the *Jus Gentium* of the Muslims and the *Jus Gentium* of the Romans; (2) the *Qánún-i-Sháhi* of the Indian sovereigns and its relation to Common Law of the country; (3) its character and claim as the *Jus Gentium* of Islám ; (4) it raises and discusses an important question whether Law and Politics should be separated from Religion, and what is the present attitude of the Muslim jurists relating to the subject.

Chapter XI is very important from the lawyer's point of view. Section I deals with the nature of *amans, i.e.*, the guarantee of protection granted to non-Muslims. I have also given in this section a short sketch of the Muslim law applicable exclusively to non-Muslims. It will explain the reasons why the Muslim sovereigns tolerated the customs and usages of the Hindus, although many of them militate against the Muslim law. Section II deals with the edicts and *farmáns* relating to non-Muslims and throws light on the Islámic International Law, while Section III points out the socialistic principles of Islám.

Chapter XII deals with the origin of certain Islámic institutions peculiar to the judicial system adopted by the Caliphs and the Muslim sovereigns of India. As a matter of fact these institutions supplied the models upon which Indian tribunals were founded. Excellent as they were in more respects than one, they became popular in the Mediæval Age even in Europe, and some of them were copied by the European Monarchs.

Special Features of the Book.

Without any presumptuousness on my part, I may mention here one fact. In the course of my investigation I have found that there are some writers who have dealt with the Administrative System, and some with the Military and Revenue Systems of certain Muslim monarchs and emperors. But hardly has any one of them paid proper attention to the Judicial System. No doubt historians in general have made casual references to it when they describe the character of a king or an emperor. A few writers have attempted in the course of their description of the Royal courts to touch the judicial system ; but their accounts are so meagre and incomplete that hardly can any proper estimate or an idea be formed from them regarding the judiciary and the tribunals that existed in the pre-British period. Moreover, their meagre accounts are interspersed with such taunts and ridicules based on racial prejudices and pre-conceived notions that they leave an impression in the mind that God founded the Creation on justice, but

left India out of his consideration. Such accounts do not satisfy the inquisitiveness of the scholar.

Researches and Inquiry.

In the course of my researches I came across certain facts *hitherto unknown*. These facts constitute topics of great interest both from legal and historical points of view. In order to verify *those facts I had to travel, at a considerable expense, through the Mughal capitals and some of the Native States, and to satisfy myself as to their authenticity*. Thus verified I have found that the facts relating to the "Scenes of trial," "description of the Qáẓi's court," "mode of trial," "the method of recording proceedings and drawing up decrees," etc., are substantially correct, and tally with the procedure laid down in the books of *Fiqah* (legal treatises), though such accounts are hardly to be found in one book, or in any particular record. They are to be gathered from various sources, and then mastered and arranged on a "scientific system of thought." The following topics constitute the special features of the book, and the subjects discussed in connection with them are the results of my enquiry and original researches conducted independently. These results may be summarized as under:—

Results of Research and Inquiry.

(1) Gradation of courts given in Tabular forms, *vide* Tables Nos. I to V in pp. 29, 38, 70, 77 and 80.

(2) Division of tribunals into the courts of Original, Appellate, and Revisional Jurisdiction; *vide* Chapter VI, Section I, p. 73.

(3) Two kinds of Tribunals—(*a*) the Court of Canon Law, and (*b*) the Court of Common Law, *vide* Chapter II, Section I, pp. 20 and 142.

(4) Constitution of Court—Summoning of *Ijlás* or Full Bench, *vide* Chapter VI, pp. 75 and 76.

(5) The power of the court to review its judgment ; Chapter VI, p. 74.

(6) How the Islámic Court used to realise costs regarding administration of justice ; *vide* discussion on Court-fee in Chapter IX, pp. 127-128.

(7) A comparative view of the Islámic Courts and the British Courts of Justice, *vide* Chapter VIII, Section III, p. 98.

(8) Law of Estoppel and Limitation, etc., Chap IX, pp. 124-126.

(9) *Jus Gentium* of the Muslims and *Jus Gentium* of the Romans—the *Qánún-i-Sháhi* of the Muslim sovereigns compared with the *Jus honorarium* of the Roman prætors, *vide* Chapter X, Sections I and II, pp. 134-142.

(10) Scenes of trial and description of the Qáẓi's court in pp. 56, 103 and 124.

(11) Preparation of the records of proceedings—*Muházir* and *Sijilát*, p. 104.

(12) Appointment of lawyers in the Muslim court, *vide* Chapter IX, Section VI, pp. 129-131.

These topics covering as they do, a wide and interesting field of legal history, have been systematized and arranged on a scientific basis. The materials

upon which these superstructures are built, have been collected by ransacking various old records, books on Fiqah and histories of the Middle Ages. They form new and special features of this thesis which are hardly to be found in any other work. Each of these topics, it is submitted, is an original production and throws much light on the judicial system of the Muslim Rulers of India.

Advancement of the Cause of Justice and Legal Science.

My researches were conducted independently, save and except the inquiry made from the aged persons for verifying the facts brought to light as stated above. The researches and investigations will, I presume, advance the cause of law and justice—especially the cause of legal history in the following respects:

(1) The history of the judicial system during the Muslim suzerainty of India does rarely exist. There are some historical works which contain fragmentary accounts of the administration of justice. But a proper, authentic and systematic history of the Islámic or the Indian judicial system has hardly been written. This book may, it is to be hoped, remove the long-felt want.

(2) Each age has its standard of morality, its ideal of justice and its measures of punishment. By comparing them with those of our age, we may make an estimate of the results produced by "cycles of legal progress." The jurist of each age has laboured to improve the judicial system of his time. His juristic notions

and legal maxims are the "survivals in culture." In these survivals we discover "egoism in gross and in an ideal aspect," and a strange combination of altruistic impulses which "are recognized in all known stages of civilization, co-lateral to egoistic tendencies of mankind."

(3) The history of the administration of justice during the Muslim rule in India discloses a combination of different judicial systems of Iráq, Spain, Egypt and Turkey. The Indian system, as we find it during the Mughal rule, is "a combination of Indian and extra-Indian elements; or more correctly, it was the Perso-Arabic system in Indian setting." A critical study of these judicial systems in comparison with the present, affords ample scope for further refining the system of our time by subordinating "the conscious ego to its environments," and establishing "a harmony between egoistic and altruistic impulses."

Foreign Accounts—not Reliable.

I have taken up this work in the spirit of love and with a view to place before the public a well-connected history of the administration of justice during the Muslim rule. Another object is to remove certain misconceptions which have created a good deal of misunderstanding and race-prejudice. These misconceptions have arisen from the haphazard writings,

off-hand observations, and sarcastic remarks of a certain class of historians who pose themselves as authentic chroniclers of the Mughal courts. But their accounts, when critically examined, betray their ignorance and prejudices. Of these writers the name of two may be mentioned—Manucci and Dr. Bernier. *Storia de Mogor* of Manucci and *Travels* of Bernier are considered as authorities on the history of the Mughal period, and are largely relied upon by the historians—especially the European. But the modern historians have shown that those books are not reliable. The authors of those books pretend to describe, as eye-witnesses, the incidents of the Harem and of the Royal Courts, as well as of the inner life of the Emperors and the nobility. It will be presently seen that as foreigners, they could not possibly have any access to the inner circles, nor any knowledge of the incidents which happened in the Harem.

Manucci's Storia.

When Manucci came to India he was an illiterate boy of 14 years. He entered into the service of Dárá Shukoh as a gunner. After the defeat of Dárá, he lived for some time in disguise, and then accepted service under Aurangzib as a petty soldier. There was no school in India for teaching the European languages. His Memoir or *Storia*, was written in three languages—French, Portuguese and Italian. Long after his death a manuscript copy is said to have been found in Berlin towards the end of the last century. How could Manucci write his memoirs in three languages, or why was a portion of it written in one language, and other portions in the languages which he did not

know ? and how did the hybrid manuscript reach Berlin ? The whole thing is a mystery. " Every part of this book manifests the author's malice, ignorance and fabrication."

Mr. Lane-Poole, the author of *History of Aurangzib*, characterizes Manucci's *Storia* thus: " The work is too full of errors, and savours too strongly of the *Chronique Scandaleuse* of some malicious and disappointed backstairs underling at the Mughal court, to be esteemed as an authority."

Mr. Sádiq 'Ali in his *Vindication of Aurangzib* observes, " Even the word *backstairs* in the above quotation is not rightly applied. Manucci never was in a position (backstairs or otherwise) to learn those things of the court, harem and other inaccessible places which he seems to take great pleasure in describing. Governor Pitt very properly called Manucci's *Storia* " The History of Tom Thumb " (p. 10).

Bernier's Travels.

Dr. Bernier arrived at Delhi towards the end of 1659. " When in Delhi, as he had accidentally lost his property and was in a helpless condition, he tried to get some employment." Having failed in his attempt he secured a monthly allowance from the State Charity Fund through the intervention of Dánishmand Khán, a kind-hearted noble in Aurangzib's court, but he was not granted any rank or *mansab*. According to the rules of the Muhgal Court, no man was allowed to attend the Royal Court unless he held a *mansab* (civil or military rank) under the State. This fact shows " that Bernier had nothing to do with the Imperial

Court or the Harem, never attended the court and never had an opportunity of talking to Aurangzib personally. or hearing him talk to others." Yet "he has recorded a pretty long speech that Aurangzib is said to have addressed to one of his old teachers on the uselessness of the knowledge he had taught him." Mr. Pringle Kennedy, the author of the *History of Great Mughals* criticizing Bernier's discourse, says:

"The whole speech savours of a lively French invention. It is what we might expect from a Frenchman living in the same half century as Fenelon and other moral authors of Louis XIV's court; beyond the fact that the tutor did not get what he wanted and was sent away without having been shown any favour, it is not safe to accept any other part of the story. Bernier indeed only used the license which other ancient and mediaeval writers have used, *i.e.*, of putting into their hero's mouths what they think they would have said, without knowing in the least what they actually did say..."

The author of *A Vindication of Aurangzib* points out: "Bernier, in his book, says that he heard of Sháh Jahán's death when he was at Golkonda on his way back to France. The Emperor's death occurred on the 22nd January, 1666, but he records subsequent events as if he were an eye-witness of them" (p. 16).

Tavernier's Travels.

"Another French traveller, Tavernier, the jeweller, recorded his memoirs which were published in two volumes ; but the greater part of that work is taken up by information concerning matters of interest to his own calling. He throws some light on the government and customs

of the Indian people of that period, but the bulk of this information is also based upon second-hand untrustworthy sources" (pp. 16-17).

I have pointed out at the risk of digression, the untrustworthy character of the writings of the European travellers, because they have greatly influenced the subsequent historians—both English and Indian. In addition to this there are other factors—racial prejudices, religious conceit, difference of traditions and sentiments—which prevent many a writer from forming a just estimate of others' character. For these reasons we find many historical works written in such a way as to extol one's own race and its institutions, and decry other races and their institutions and hold them up to ridicule. The serious consequences of such writings have been the poisonous growth of racial prejudices, class-hatred, religious conceits and communal discord. It is high time that our historians should be careful. We require true history of our country and not the conceits and idiosyncracies of the historian.

Sources of materials.

I have discarded from this book those accounts of the Mughal court which have been characterized as fabricated or untrustworthy by such historians as Alexander Dow, Lane-Poole, Kennedy and others. I have also excluded the inaccurate descriptions, taunting remarks and reckless observations of those Indian historians who have blindly followed the European authors and have drawn largely from the accounts of the foreign travellers noticed above. I have collected materials from the following sources:—

(1) The Court Chroniclers and private historians—both Muslim and Hindu—who had access

to the Royal Court or were associates of the *Arkan-i-Daulat* (nobles of the State), or had first-hand knowledge of the incidents they describe.

(2) The Memoirs and Institutes of the Sultans and Emperors, as well as their *farmáns* and *Dastur-ul-ámals* which are store-houses of information.

(3) Books on the Fiqah which deal with legal procedure, law of evidence and duties of the judicial officers.

The following two quotations will explain my reason for relying on the sources stated above. P. Kennedy in his *History of the Great Mughals* says:

"But all the same the kernel of veracity, the desire to tell what is true, and the trouble to find it out, are everywhere to be found in our Indian Muhammadan Historians. They have practical historical sense strongly developed, and their accounts are to be preferred to those of any European traveller when one wishes really to study the history of the time. European visitors to India may be taken to truly report what they themselves have seen; but a great part of their writings is taken up with what they heard, and much of this must have been from their own servants, the most unreliable of all the native sources."

Alexander Dow in his *History of India* observes:

"Though the manner of Eastern composition differs from the correct taste of Europe, there are

many things in the writings of Asiatic authors worthy of the attention of literary men. Their poetry, it must be conceded, is too turgid and full of conceits to please, and the diction of their historians very diffuse and verbose ; yet amidst the redundancy of the latter, we find that scrupulous attention to truth, and that manliness of sentiment, which constitute the very essence of good history."

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ADMINISTRATION OF JUSTICE
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INTRODUCTION

Conception of Justice in Islám

تمت کلمت ربک صدقا و عدلا

" Fulfil the commands of thy Lord with truth and justice."—*Qúrán.*

" Life cannot be maintained without society, nor society without government, nor government without religion."—*Akhláq-i-Jaláli.*

From the dawn of civilization when societies were gradually formed, people required protection from wrong-doers. Not only life and property were to be protected, but social and personal disputes were requir-ed to be settled and antagonistic claims adjusted. Hence arose the necessity for administration of justice.

According to Muslim jurists the protection of the weak and punishment of the evil-doer are not the sole functions of justice. Establishment of peace on earth, concord among humanity, advancement of so-ciety, and safeguards for social interest are the pillars of justice. In the *Qánún Námah* which contains the secular laws of the Turks we find an aphoristic dictum which says, "the dome of the State is supported by four pillars." [1]

1 Creasy : " History of the Ottoman Turks," p. 158.

The Qûránic text quoted at the top has a deeper significance. The commentators in explaining the passage where the verse occurs, point out that it refers to the Divine plan of Creation in ordaining things in their relation to one another. The Divine Design is without a model, but the whole of the Divine plan and the underlying principles of actions are based on justice and equity. It is for men in their mutual dealings to act up to the Divine plan which serve for them as a model and an ideal.

Another verse gives the following direction: "When you decide between people, give your decision with justice."—

(اذا حكمتم بين الناس ان تحكموا بلعدل)

It may be said that the text contains an injunction which relates to the administration of justice between Muslims only. But it is not so. The verse is of general application. Any doubt or dispute regarding its implication has been set at rest by the Prophet himself. With reference to the cases and concerns of the Jews, he enunciated the following rule: "And when you give your decision, decide between them (*i.e.*, the Jews) with justice : surely God loves those who do justice."

و ان حكمت فاحكم بينهم بالقسط-ان الله يحب المقسطين

Al-Qûrán lays great stress on Justice. It goes so far as to hold that the Creation is founded on justice. It says, "We have not created the heavens and the earth, and whatever is (contained) between them, otherwise than in justice" —(15 : 55). This is the

starting point. We also find in the Qûrán that one of the Divine attributes of God (which are called *asmá-i-húsna*, "the excellent attributes") is "just." Consequently, justice is regarded as a part and parcel of the Divine nature of God, and the administration of justice as a divine dispensation.

Another point on which stress is laid is that the administration of justice must be without a tinge of bias or partiality. This point has greatly been emphasized in the Qûrán. It says:

"O true believers, observe justice when you appear as witnesses before God, and let not hatred towards any induce you to do wrong: but act justly; this will approach nearer unto piety, and fear God, for God is fully acquainted with what you do."—*Qúrán* 5: 8.

"O you who believe, be maintainers of justice when you bear witness for God's sake although it be against yourselves, or your parents, or your near relations; whether the party be rich or poor, for God is most competent to deal with them both, therefore do not follow your low desire in bearing testimony so that you may swerve from justice, and if you swerve or turn aside then surely God is aware of what you do." (4 : 135.)

The Muslim Canon Law has also laid down strict rules for the guidance of the Qáẓis in administering justice without distinction of race and creed, friends and foes. The second Caliph ('Umar) issued a *farmán* to the governor of Kûfa containing instructions for the administration of justice. One of the instructions is—" Treat all men justly and on equal footing when

they appear before you in the court."[1] Another *farmán* of his contains the following instruction: "in dealing justice regard all men as equal, and treat the near and the remote on equal footing, and keep yourself free from corruption."[2]

The Qûrán has set up an ideal of justice by referring to the Divine Balance—"the Balance of Justice." It says:

The Divine Balance of Justice.

"And He appointed the Balance that ye should not transgress in respect to the balance; wherefore observe a just weight and diminish not the balance (*i.e.*, measure)"—(55 : 7-9).

"Certainly we sent Our Apostles with clear arguments and sent down with them the Book and the Balance (*i. e.*, measure of justice) that men may conduct themselves with equity"—(57 : 25).

Balance stands for justice (*'adl*). "It does not signify in the Qûrán a pair of material scales, but a *measure* as signifying *any standard of comparison, estimation or judgment*."[3]

Hence the Divine Balance is the symbol of justice and equity; observing "a just weight without diminishing the balance" signifies administering even-handed justice without partiality. It also means "doing justice and equity in mutual dealings." The implication is that God himself has set up a Balance in which good and evil are weighed and justice is done

1 Shibli: "Al-Fárûq," Part II, p. 49.
2 "Kanz-ul-'Ammál," Vol. II, p. 1147.
3 M. Ali's Translation of the Qûrán, p. 1029.

not arbitrarily but according to a just measure. Here an ideal standard has been set up before mankind for doing justice and equity in their dealings with one another.

This ideal has not been kept confined within the domain of abstract theory. The Muslim monarchs tried to imitate it and act up to the Divine Plan. The Emperor Sháh Jahán had a balance and a pair of scissors engraved in a "luminous" stone, and set it up on the arch of the door of *Diwán-i-'Am*, the "Hall of Public Audience." This was the symbol of justice of the Mughal Emperors. It conveyed the idea that justice would be weighed in the balance, after pruning the extraneous matters from the claims of the parties with the scissors of equity. These symbols are still to be seen on the doorway of the *Diwán-i-'Am* in Delhi.

The Emperor Jahángir adopted another device to bring justice within the easy reach of every person without the intervention of the court officials. He ordered to make a chain of gold thirty yards in length containing sixty bells. One end of the chain was fastened to "the battlements of the Sháh Bûrj of the fort at Agra and the other to a stone-post fixed on the bank of the river" (Jumna).[1] The Emperor generally held the royal court to hear complaints.[2] The aggrieved parties used to pull the chain. The sound of the bells apprised the Emperor that the pullers of the chain wanted redress. They were ushered into the

[1] Bogers and Beveridge, p. 17.

[2] Beni Prasad : "History of Jahángir," p. 110.

royal presence, and the Emperor used to personally hear their grievances and redress their wrongs.

The above instances tend to show how the ideals of justice and equity held up in the Qûrán, have influenced the mind of the Muslim monarchs of India.

Administration of Justice in the name of God or of the Community.

One of the noteworthy features of the administration of justice is that at the beginning of Islám justice was administered in the name of God, or of the Caliphate representing the entire Muslim community, but not in the name of the Caliph, or Sultan, or Emperor. The author of *Minháj-uṭ-Ṭálibin* points out that "the entire Muslim community is responsible for the administration of justice."[1] It was administered with reference to the laws of the Qûrán, the traditions handed down from the Prophet (*Hadiths*), and general concordance among the followers—especially of the first four Caliphs (*Ijmá-i-Ummat*). The doctrine of *Qiyás*, "Exercise of private judgment," was gradually introduced. Thus it is clear that the fountain-head of justice was God, and not the Caliph or the King. After the first four Caliphs when the republican form of the Islámic Commonwealth came to an end, justice was administered in the name of the ruling monarch. In India, "the Mughal emperor loved to pose as the fountain of justice and followed the immemorial eastern tradition that the King should try cases himself in open court."[2]

[1] Minhaj-ut-Ṭalibin (translated by Howard), p. 500.

[2] J. N. Sarkár : "Mughal Administration," p. 13.

Place of Justice.

Another noticeable feature was that cases must be decided openly in a public place. In the beginning justice was administered in the mosque of the Prophet (*Masjid-un-Nabi*). Even after his death mosques were selected for deciding cases till the establishment of *Dár-ul-Qazá* (the court of justice). Reason for selecting mosques as the place for administering justice was that they were open to the public, and none could object to entering the public place of worship.[1] When the separate buildings for holding courts were constructed during the Caliphate of Hazrat 'Umar, *Qázis* used to hear cases there. But the *Dár-ul-Qazá* was regarded as a public place and was open to all. Besides *Dár-ul-Qazá*, the Muslim kings and emperors used to hold royal courts (*Diwáns*) at their palaces. But such *Diwáns* were also open to litigants and the public in general. Such was also the case with the Caliphs of Iráq, Egypt, and Spain.

When the Muslim monarchs established themselves in India, they followed the examples of the Caliphs. A number of courts of justice were established in towns and provinces. These courts were open to the public, and the judges and magistrates (*A'dils* and *Qázis*) used to administer justice in open courts. The emperors used to hear cases in the *Diwán-i-'Am* (the Hall of Public Audience), and sometimes in the *Diwán-i-Khás* (the Hall of Private Audience). These magnificent *Diwáns* were attached to the palaces where litigants and public had free access.

[1] Shibli Nûmáni : "Al-Fárûq," Part II, p. 47 ; also p. 55.

Justice by Sovereigns in person.

Of the most important duties assigned by the *Shari'at* (Canon Law) to the Caliph, two may be mentioned here—one was to lead personally the congregational prayer on Friday at *Jáma' Musjid* (public mosque), and the other to administer justice personally in a public place. The first four Caliphs (*Khulafá' i-Ráshidin*, "the rightly- guided Caliphs") strictly performed these duties during the Islámic Commonwealth. Afterwards when the boundaries of the Caliphate were extended far and wide, it became impossible for the Caliphs to attend to these duties in person. They, therefore, charged the governors (*Amirs*) to perform those duties in their name in distant provinces. But in the capital the Caliphs, with the exception of a few, discharged those duties faithfully. The Muslim Emperors in India acted up to this ideal. They used to decide cases personally with the assistance of the Qáẓis and the Muftis who were the law-officers of the Crown (*vide* Description of the Mughal Emperor's Court, Chapter IV).

Hindu idea of Justice.

This is not a peculiar feature of the Islámic system of the administration of justice. The Code of Manu (*Manu-Saṃhitá*) and other legal treatises of the ancient Hindus assigned to the king the duty of administering justice in person. This has been the hoary tradition of the East. It has been regarded as a religious duty in all Eastern countries and kingdoms. According to the Hindu idea of the administration of justice " the king was the fountain-head of

justice."[1] In *Manu-Saṃhitá* we find *sutras* (maxims) like these—" Depending on the eternal law, let him (the king) decide the suits of men" (Chapter VIII: 9); " If the king does not personally investigate the suits, then let him appoint a learned Bráhmaṇa to try them." (Chapter X.) Nárada lays down the rule thus: " Attending to the dictates of law-books and adhering to the opinion of his Chief Justice let him (*i.e.*, the king) try causes in due order."[2] During the Hindu period justice was administered in the open court (*dharmádhikaranam*) as well as at the palace.

The idea of administering justice by the king in person and in the open court prevailed everywhere in Eastern countries—in China, Japan, Burma, Persia, Egypt, and in the ancient Jewish kingdoms of Caanán and Palestine. This idea was ingrained in the mind of the Eastern jurist. It is no wonder then that the Caliphs and the Muslim monarchs used to administer justice in person, or that the *Shara'* (Canon Law) enjoins this duty upon them.

Speaking on this subject Prof. J. N. Sarkár observes: " According to the ancient political ideal, which both the Hindus and the Muhammadans accepted, the Sovereign is the fountain of justice, and it is his duty to try cases personally in open court. The Mughal Emperor acted up to this ideal and we possess contemporary accounts, written by court historians and European travellers alike, as to the manner in which they dispensed justice."[3]

[1] Nárada (Jolly), Legal Procedure, III: 7.

[2] *Ibid*, p. 35.

[3] Sarkár: " Mughal Administration," p. 106.

CHAPTER I

Administration of Justice during Muslim Rule

SECTION I.

Administrative System—Its Model.

When the Muslim conquerors came to India, a gallaxy of scholars well-grounded in Arabic and Persian came with them. In their train followed the dreamy poets and polished writers, cautious chroniclers and laborious historians, venerable theologians and casuistic jurists. Many of them came in search of honour and emolument. The *Ulamá* (learned in theology) and the *Fuqahá'* (canonical jurists) had knowledge of Muslim law and jurisprudence and were conversant with the functions of the court. The talented among them filled the offices of the State and became the advisers of the sovereigns. The learned in law were appointed to perform the functions of the court of justice. Under their advice and inspiration the Muslim sovereigns of India took for their model the administrative system of the Abbásid Caliphs of Iráq, the Umayyád Caliphs of Spain, and the Fátimide Caliphs of Egypt. Their judicial machinery was also set up on the same model. Consequently, it is necessary first of all to ascertain the judicial system of the Caliphate for the proper appreciation of the system of justice adopted by the Muslim sovereigns of India. But to avoid digression I have given a short sketch of the same in a separate chapter

and placed it at the end of the book. It should be borne in mind that the Indian kings and emperors were not the only monarchs who took as their model the judicial and administrative machineries of the Caliphate, but even the European monarchs copied not a few of the institutions of the Arabs in the Mediaeval Age.[1] For, as pointed out by Deutsch "They (the Arabs) alone of all the Shemites came to Europe as kings whither the Phœnicians had come as tradesmen and the Jews as fugitives or captives, came to Europe to hold up together with these fugitives the light to humanity—they alone, while darkness lay around, to raise up the wisdom and knowledge of Hellas from the dead, to teach philosophy, medicine, astronomy and the golden art of song to the West as to the East, to stand at the cradle of modern science and to cause us late epigoni for ever to weep over the day when Grenada fell."

There is another stronger reason which induced the people of other countries—conquered and unconquered—to adopt the Arab institutions. It is the democratic and socialistic spirit of the Qûrán and the republican character of the Caliphate which captivated the imagination of the European and Asiatic nations. Von Kremer speaking of this institution observes that it was "the communistic-democratic system of politics founded upon the basis of theocracy, one of the most remarkable phenomena of history. The whole of antiquity has nothing to show which could

1 The Norman ruler of Sicily established, among other Arab institutions, the Board for the Inspection of Grievances (*Diwán-ul-Mazâlim*): Amari, Vol. III, 445.

be compared with it."[1] It is no wonder then that Muslim kings and emperors took the Arab institutions as their model and established some of them in the land of Hind and Sindh.

It will be seen hereafter that even those Hindu kings who were not under the suzerainty of the Muslim emperors adopted their judicial and administrative system in their own states ; just as some of the European kings adopted and established certain Arab institutions in their own kingdoms. It seems to me that the Muslim jurists who spread over the foreign countries, such as Egypt, Spain, and Turkey in Europe, acquired knowledge of the judicial and administrative systems of those countries. With judicious selection and rejection they adopted the best of the foreign systems and incorporated them into their own. Consequently, the institutions which the Caliphs and other Muslim sovereigns adopted were then considered the best and worthy of imitation. For this reason, perhaps, some of the Hindu Rajas also adopted the Muslim judicial and administrative system in their kingdoms. Of this later on.

Von Kremer's Monograph, "Culture under Caliphs."

SECTION II.

APPLICATION OF MUSLIM LAW—ITS SCOPE AND EXTENT.

It is ordinarily believed by the common run of people that the Muslim sovereigns governed India with the laws of *Shara'* (Canon Laws of Islám) "imported ready-made from outside India."[1] This is not wholly true. This mistaken notion has arisen and got currency from the off-hand remarks and careless writing of a certain class of historians, who with a little knowledge of Persian and less of Arabic, pose themselves as the exponents of the laws of *Shara'*. They do not take notice of the fact that Muhammadan law consists of two parts, religious and secular; and that each portion has its special application. This may be due to ignorance or lack of proper appreciation. But a shrewd suspicion lurks in their writings that their apparent object is to hold up the Muslim rule to ridicule and create racial hatred. However, this is not the place to expose their motive or rectify their errors. But such writers must be held responsible for many ills arising from racial hatred and discord from which India has been suffering.

It should be borne in mind that the *Shari'at* enjoins that the Canon Law should be made applicable only to those who believe in the Islámic religion. Consequently, the whole body of the Muslim law is not

1 Sarkár: "Mughal Administration," pp. 2-4.

applicable to non-Muslims.[1] The Muslim jurists have classified the Muslim law under two broad heads—*Tashri'yi*, religious, and *Ghair-tashri'yi*, secular. The purely religious portion of law is applicable to Muslims only. The secular portion which is in substance common to all nations, applies to Muslims and non-Muslims alike. The principle is thus stated in the *Fatáwá-i-ʿAlamgiri*: "Non-Muslim subjects (*Dhimmi*) of a Muslim State are not subjects to the laws of Islám." Their legal relations are to be regulated "according to precepts of their own faith."[1] The Prophet himself enjoined—"leave alone the non-Muslims and whatever they believe in."

Extent of its application.

Such being the policy of the Islámic law, the extent of its application to India during the Muslim rule may be stated below:—

I. *Civil Law.*—(*a*) The purely personal law of Islám relating to inheritance, succession, marital rights, guardianship, will, endowment, gift, etc., was applied to Muslims only, as is the case under the British rule.

(*b*) The secular portion of the civil law relating to trade, barter, exchange, sale, contract, etc., was made applicable to Muslims and non-Muslims alike.

II. *The Laws of the Land.*—The system of taxation relating to land revenue, minerals, quarries, manufacture, agriculture, excise, octroi (*chungi*), merchandise, sea-borne trade, etc., were adopted from the people of this country by the Muslim sovereigns of

[1] Baillie : "Digest of Muhammadan Law," p. 174.

India with necessary modifications. These taxes and imposts were levied on and realised from all races (including Muslims) alike.

III. *The Religious and Personal Laws of the non-Muslims.*—The Hindus, the Buddhists and other non-Muslim subjects were governed by their own respective religious and personal law. When the tribunal happened to be the court of the Qáẓi, or the court of the sovereign the suits involving the points of personal law of the Hindus, were used to be decided with the aid of the learned Pandits and Brāhmaṇas; in the case of the other races, with the aid of their learned men.[1]

IV. *Criminal Law.*—(*a*) The portion of the Islámic Canon Law which deals with religious infringement, was applied to Muslims only ; such as drinking, marrying within the prohibited degree, apostacy, etc. For such offences non-Muslims were not held liable to punishment under the laws of *Shara'*.[2]

(*b*) That portion of the Islámic criminal law which punishes the acts which constitute crimes in the estimation of all nations, was applied to Muslims and non-Muslims alike, *e.g.*, adultery, murder, theft, robbery, assault, etc.[2]

V. *The Qánún-i-sháhi* or the Edicts and Ordinance, contained in the *Farmáns* and *Dastur-ul-'amal* for the guidance of the officers of the State. They were the common law of the people of the country

[1] Baillie : "Digest of Muhammadan Law," p. 174 ; Fatāwā-i-Alamgiri, Vol. II, p. 357.

[2] A. Rahim : "Muhammadan Jurisprudence," p. 59. "Sharh-i-Vaqáya," Vol. III, Chapter on Qaẓá (Judicial Administration).

as opposed to the Canon Law. These *Qánúns* were binding upon the judicial and executive officers, and in compliance therewith the courts of common law were established in India. (*Vide* Chap. II.)

Such have been the scope and extent of the law applied to the Muslim and non-Muslims of India during the Muhammadan rule. It is clear that the body of laws which controlled the social life and regulated the legal relations of the Indians (including Indian Muslims) consisted at least of three kinds of laws—the Indian Law,[1] the Muslim law, and the *Lex Loci* or the municipal laws of the country which did not properly come within the scope of the Hindu or Muhammadan law, but many of them consisted of the various local taxes and duties and customs. This kind of law was often imposed by the *farmáns* and edicts of the emperors. Of this I shall speak later on. It should be noted that the municipal laws as well as the various local taxes and imposts which are mentioned in the books on *Fiqah* as imposed by the Caliphs, were not applied by the Muslim sovereigns to the Indian people. Further, the secular portion of the Muslim law underwent changes and was often modified by the *Sháhi Farmáns* (*vide* Chap. VIII). Hence it is not correct to say that the Muslim rulers governed outside India with the laws "imported ready-made from India."[2]

1 *i. e.*, the laws of the Hindus, the Buddhists, the Jains, etc.

2 Sarkár: "Mughal Administration," p. 6. The author's remarks are quite out of mark, and do not stand the test of scrutiny.

SECTION III.

DIVISION OF THE PERIOD OF MUSLIM RULE IN INDIA.

In order to get a clear idea of the administration of justice during the Mughal Rule in India, we shall have to bear in mind certain historical facts. For the purpose of our inquiry the Muslim rule may be divided into the following periods:—

I. *The period of conquest and military occupation.*—From the Arab conquest of Sindh till the invasion of Subuktigin (712-991 A.D.).

II. *The period of successive invasions without any attempt to establish a government in India.*—From the death of Subuktigin till the invasion of Mahmud Ghazni (999-1206 A.D.).

III. *The period of settled government with judicial tribunals.*—From the time of the Slave Dynasty till the death of Sher Sháh (1206-1555 A.D.).

IV. *The period of well-established government with an extensive judicial machinery.*—From the Mughal Rule till the grant of Diwáni (1556-1765 A.D.).

First Period.

The period of conquest and military occupation commenced from 712 A.D. when the famous Arab general, Muhammad Bin Qásim defeated Rái Dáhir and annexed Sindh and Multán. He appointed Wida as the Governor of Bráhmanabád. Although the provinces were held by the Arabs, it was merely a military occupation. There was no Muslim Government in

the proper sense of the term. Qásim entrusted the internal administration of the conquered provinces to the Bráhmans who held important positions in the reign of Rái Dáhir. The administration of the country was, therefore, carried on by the Indians themselves without any interference by the conqueror.[1] The administrative and judicial machinery remained the same in the hands of the Hindu officials, who held courts and administered justice in accordance with their *Shástra.* During this period no portion of the Muhammadan law—not even the law relating to *Dhimmi* (non-Muslims), was applied to the Hindus of the conquered provinces. As regards the Muslim soldiers who remained in the occupation of the country, they were governed by the Muslim law, and their disputes were decided in the court of the Qáẓi with the assistance of the Mufti. In the case of miscarriage of justice the Provincial Governor (Ámil) used to hear appeal—more properly speaking, revise the judgment of the Qáẓi in consultation with the Qáẓi and Mufti who assisted him (the governor) in arriving at a right conclusion.

Second Period.

The period of successive invasions and turmoil began from the incursions of Subuktigin (991 A. D.) and lasted till the permanent conquest of India by Muhammad Ghori (d. in 1206). During this period Sultán Mahmud of Ghazni led his famous expeditions

[1] Elphinstone: "History of India," pp. 302-303. H. M. Elliot: "Arabs in Sindh," pp. 2-8.

to India. He did not establish any stable government. All his invasions were plundering expeditions. " Of this period we have no record of the Muslim administration of justice in India." [1]

Third Period.

The period of the settled government commenced from the Slave dynasty (1206-1290 A.D.) and continued during the reign of Khalji dynasty (1290-1321), the Tughlaq dynasty (1321-1413), the Lodi dynasty (1451-1526), and the Sur dynasty (1539-1555). During these periods there was a permanently-settled government in India, and the administrative and judicial machineries were set up for the better working of the government.

One of the noteworthy features of the Muslim sovereignty of India is that from the time of the Slave Kings the Muslim sovereigns adopted India as their home, and Muslims became the permanent inhabitants of this country. There were, no doubt, influx and efflux, but the influx was greater than the exodus. Consequently, the monarchs began to devote greater attention to the consolidation of the government of the country. This led to the rapid improvement of the civil and judicial administration.

[1] Dr. Muhammadullah : " The Administration of Justice of Muslim Law," p. 57.

CHAPTER II

Administration of Justice

SECTION I.

PRE-MUGHAL PERIOD.

Tribunals.

During this period we find that regular tribunals were established; Judicial officers of different grades were appointed, court-houses (*mahkuma-i-'Adálat*) built, rules of procedure as prescribed in the law-books observed, and the decrees passed by the judges, enforced. Further, the court of revision (*murafi'at*) was constituted, Censors (*Muhtasibs*) were appointed for the supervision of public morals and illegal traffic, and for the control of grog-shops and suppression of gambling dens. The Chief Judge (*Qáẓi-ul-Quẓát*) was first appointed to supervise the work of the subordinate Qáẓisat the time of Kutbuddin Aybak. His love of justice led Hasan Nizámi, the author of *Táz-ul-Má'sir*, to remark: "he extinguished the flame of discord by the splendour of the light of justice."[1]

Appeal.

It was the practice of the Muslim sovereigns to administer justice in person. Accordingly, we find that almost all the Muslim monarchs of these periods used to hold court and hear suits and appeals. Al-Badáyuni points out that Sultán Muhammad

[1] H. M. Elliot: "History of India," Vol. I, p. 208.

Tughlaq constituted himself " the Supreme Court of Appeal," and used to revise the decisions of Qáẓis and to upset their judgment for the ends of justice.[1] The same author says:—

" The Sultán used to keep four Muftis to whom he allotted quarters in the precincts of his own palace... so that when any one was arrested upon any charge, he might in the first place argue with the Muftis about his due punishment. He used to say, 'be careful that you do not fail in the slightest degree by defect in speaking that which you consider right, because if any one should be put to death wrongfully the blood of that man will be upon your head.' Then if after long discussion they convicted (the prisoner) even though it were midnight he would pass order for his execution."[2]

Muhammad Tughlaq.

From the above description it is clear that the sovereign's court (*Diwán-i-'Adálat*) was original as well as appellate. This was, it will be seen, the special feature of the Muslim Kings' and Emperors' courts. It was also a feature of the court of the Hindu kings, and it will not be incorrect to say that it has been the special feature of all eastern monarchs.

Dr. Muhammadulla points out that Muhammad Tughlaq " appointed distinguished officers of the State as judges irrespective of the fact whether they were *Ulamá* or not." Ibn Batuta speaks very highly of the Sultán; in his opinion " of all men this king is the

1 "Muntakhab-i-Tawarikh," p. 311 (translated by G. S. Ranking).

2 "Al-Badáyuni " (translated by Ranking), p. 317.

most humble and of all men he most loves justice... The Sultán submitted to the decrees of the court passed against himself."

Although the Muslim sovereigns of India were absolute monarchs, they were subject to the court of justice and used to uphold the majesty of law.

Ráziya Begum.

Sultána Ráziya (daughter of Altamish) furnishes a striking example that a Muslim lady can be a queen and Qáẓi under the Muslim law. Chánd Sultána is another example which demonstrates that the daughters of Islám enjoy the same rights and privileges as her sons (*vide* Chapter XI, Sec. iii).

Ra'ziya Begum.

Ráziya Begum " gave up the seclusion of Zanána and transacted business in open court like a king. She even put on the head-dress of a man." She used to hold court and dispense justice in person with the Qáẓis and Muftis who attended the audience-hall. The ordinary machinery of justice functioned its duties in the usual manner.

Ghia'suddin Balban.

Ghiásuddin Balban established a strong government and effected certain improvements in the administration of justice. He was an impartial dispenser of justice, and "never showed any partiality towards any of his subjects even if they were his kin and relations. Balban also established a system of espionage with a

[1] " Administration of Justice of Muslim Law," p. 60; "Al-Badáyuni," . 318.

view to make the administration of justice efficient; the spies were called upon to report every act of misconduct and every instance of miscarriage of justice to the monarch directly." Henceforth it will be seen hereafter, that the system of espionage was kept up and carried to the extreme by the Mughal Emperors of India.

Sikandar Lodi.

During the reign of Sultán Sikandar Lodi the designation of *Qázi-ul-Quzát* (Chief Judge) was changed to *Mir-i-'Adl* and the court of the Chief Judge was replaced by *Dár-ul-'Adl.* He initiated several reforms in the judicial and administrative machinery of the government but could not give effect to them owing to his death.

[1] Dr. Muhammadullah: "Administration of Justice of Muslim Law," p. 58.

SECTION II.

JUDICIAL REFORMS OF SHER SHA'H.

During the *Saltanat* of Sher Sháh both the judicial and the executive machinery was greatly improved. He introduced various reforms which may be summarized thus:—The provinces of his empire were divided into administrative units called *sarkárs*, which were again subdivided into *Parganas*. He appointed *Shiqdárs*, a new set of officials who were the executive officers for the administration of criminal justice, and *Munsifs* who used to try civil suits. The Chief *Shiqdár* (*Shiqdár-i-Shiqdárán* as he was called) was responsible for the administration of each sarkár, and the Chief Munsif (*Munsif-i-Munsifán*), for the civil administration. He also acted as a Circuit Judge. Sher Sháh posted these civil and executive officers in each pargana, and took care not to destroy the autonomy of the village community. The civil judges of his period were not necessarily *'Ulamás* or *Faqihs* (lego-theologians).[1] He further appointed *amins, kárkúnnavises* and *fotahdárs*. The amin was in charge of assessment and collection of revenue ; the fotahdár[2] was the treasury officer ; and kárkûns were the office assistants

Shiqda'r.

Munsif.

1 "Al-Badáyuni," p. 496.

2 A cash-keeper, a money-changer, an officer for weighing money and bullion (corrupted into Potdar in Bengal).

to do clerical work. The fotahdár and kárkûn were subordinate to the amin or the revenue officer. The Police duty was entrusted to the Shiqdár. Henceforth we find that the Court of Canon Law was supplemented by the Court of Common Law.

He introduced the system of *Patta* and *Qabuliyat* by which each raiyat was furnished with a document of the rights and incidents of his tenancy.

The village administration was left to the village community, the autonomy of which was not disturbed. But Sher Sháh appointed *Muqaddams* or the village headmen who were held responsible for the commission of offences in the village, and required to produce the offenders before the proper authority. The duties of the muqaddams were to keep watch over thieves, robbers and bad characters and to detect crimes when committed. For the performance of such duties, they used to get remuneration either in cash, or by grant of land, or a share of the village produce.

Sher Sháh issued various *farmáns* containing instructions for the guidance of the civil and executive officers of the *sarkárs*. His instructions "on all important points of religion and civil administration were written in these documents whether agreeable to the religious law or not, so that there was no necessity to refer such matters to the Qáẓi or Mufti nor was it proper to do so."[1] The officials of the state were bound to act in accordance with the instructions which constituted *Qánun-i-Sháhi* or the kings' edicts. This body of edicts of the Muslim sovereigns

[1] "Al-Badáyuni," p. 496.

and their governors resemble *Jus-Gentium* of the Roman Law (*vide* Chapter VIII, Secs. i and ii).

Dr. R. C. Majumdar points out that " he (Sher Sháh) for the first time, recognised the fact that India was the land of both the Hindus and the Muhammadans and made an attempt to reconcile the two elements. He improved the system of coinage issuing abundant silver coins and used Hindi character along with the Persian on his coins. "

It may be noted that during the reign of the predecessors of Sher Sháh, the judiciary under the Chief Qázi were called *Dád-bák, i.e.*, the dispenser of justice, [2] and Sher Sháh called his ministers *Arkán-i-Daulat*, " the pillars of the State." They were the high functionaries of the *Sultanat*.

[1] " A Brief History of India," p. 133.

[2] H. M. Elliot : " History of India," Vol. III, p. 126.

SECTION III.

Retrospect : Judiciaries and Tribunals.

From the description given in the previous sections, it has been seen that during the pre-Mughal period the judiciaries and their designations were not always the same. They were different with different designations under different monarchs. But the *Qáẓi*, *Mufti* and *Muhtasib* were the permanent limbs of the judicial machinery. In addition to these judicial officers, India had *Mir-i-'Adl*, *Shiqdár*, *Munsif*, *Dád-bák*, *Diwán*, and *Qáẓi-ul-Quẓát* who were included within the official category of *Arkán-i-Daulat*. Similarly, the judicial tribunals were not the same during the pre-Mughal period. It appears that two kinds of tribunals existed—the Court of Shara' (*adálat-i-Shar'ya*), and the Court of Common Law. The Court of Canon Law used to deal with the cases involving the personal law of the Muslims and the infringement of religious injunctions. The Court of Common Law decided the cases of secular nature.

Court of Canon Law.

Court of Common Law.

As regards non-Muslims—Hindus, Buddhists, etc., they were subject to the tribunals of the country, but the cases which involved their personal law, were decided by the Court of Common Law assisted by the learned men of their respective community, just as the Court of Canon Law was assisted by the *Mufti*.

During the reign of Sher Sháh the two kinds of tribunals assumed a distinct character. The judicial

reforms introduced by him had a marked effect upon the constitution of the courts. It appears that Sher Sháh did not much favour the old system of administration of justice by the Qáẓis only. He issued comprehensive instructions for the constitution of the court and guidance of the judicial officers. His *farmáns* led to the differentiation of the two classes of courts. As pointed out by Al-Badáyuni his Regulations concerning religious matters and civil administration "were written in these documents (*farmáns*) whether agreeable to the Religious Law or not; so that there was no necessity to refer any such matter to the Qáẓi or Mufti, nor was it proper to do so."[1] Thus the functions of the two sets of tribunals were made distinct, and the administration of Muslim law was greatly modified. Further, the powers and jurisdiction of the Court of Canon Law were restricted to particular classes of cases. From the *farmáns* it also appears that Sher Sháh used to select talented men as judges whether they were *Ulamás* or not. Consequently, the civil judges of this period were not necessarily Canon Lawyers.

The judicial reforms were first initiated by Sultán Sikandar Lodi. They were given effect to by Sher Sháh. But Sher Sháh had his own scheme of administrative and judicial reforms, and he took bold steps to carry them out. We shall see in the next chapter how the judicial machinery was further improved during the Mughal period.

[1] "Al-Badáyuni," p. 496; also Dr. Muhammadullah: "Administration of Justice of Muslim Law," p. 63.

I give below in a tabular form the name of the tribunals and the designation of the presiding officers so that the reader may see at a glance what sort of judicial machinery existed before the Mughal period.

TABLE I.

A.—During the Reigns of the Slave, Khalji, Tughlaq and Lodi Dynasties.

	Tribunal.	Presiding Officer.
1.	The Royal Court ...	The Sultán.
2.	The Chief Court of Justice.	The Mir-i-'Adl.
3.	The Court of the Chief Qáẓi.	The Qáẓi-ul-Quẓát.
4.	The Subordinate Court of Canon Law.	The Qáẓi.
5.	The Subordinate Court of Common Law.	The 'Adl or Qáẓi.

B.—During the Reign of Sher Sháh.

	Tribunal.	Presiding Officer.
1.	The Court of the Sultán	The Sovereign.
2.	The Chief Civil Court ...	The Munsif-i-Munsifán (Chief Munsif).
3.	The Chief Criminal Court.	The Shiqdár-i-Shiqdár-án (Chief Shiqdár).
4.	The Civil Court of Common Law.	The Munsif.
5.	The Criminal Court of Common Law.	The Shiqdár.
6.	The Court of Canon Law	The Qázis.

Appeal.

Appeal lay from the Subordinate Courts to the Chief Civil and Criminal Courts respectively and therefrom to the Royal Court (*vide* Chapter VI).

CHAPTER III

Administration of Justice

MUGHAL PERIOD.

The period of the Great Mughals was the Golden Age of India. It was the period of pomp, power and glory, when the prosperity of the country rose to the zenith. The general features of the Mughal Administration had several characteristics of which four may be noticed:—*First,* a strong and well-organized Government contributing to peace and order; *secondly,* a highly centralized form of Government with an extensive administrative machinery; *thirdly,* an age of Renaissance in Art and Literature; and *fourthly,* an Empire of Unity in which different racial elements were more or less reconciled and contributed their skill, ability and wisdom to make the Government prosperous. Volumes can be written on each of these points, but as the scope of this book is limited, I am obliged to confine myself only to the judicial administration of the period.

In the previous chapters I have given some details of the administration of justice preceding the Mughal period. The machinery through which justice was administered has also been noticed. Now let us turn to the characteristics and the mode of administration of justice during the Mughal period. For the purpose of my inquiry I have divided the Mughal period and discussed the topic under three heads: (1) the administrative and judicial system during the reign of Akbar; (2) the administration of justice under his successors; and (3) the judicial machinery which was found to exist on the breakdown of the Mughal Empire.

SECTION I.

Judicial and Administrative System.

Reign of Akbar.

When Akbar got the rein of government in his hand he introduced drastic changes in the administration of the country. He adopted to some extent the reforms initiated by Sher Sháh, but set up the judicial machinery under a new name and style. The designation of some of the judicial officers was also changed. Similarly, changes were also made in the administrative machineries. As they are inter-connected it is necessary that some notice should be taken of them.

Sher Sháh divided the provinces of his Empire into *sarkárs* which were again subdivided into *parganas*. Akbar divided the whole empire into *Subahs* or provinces. The Subahs comprised more than 100 sarkárs or districts, and each sarkár was an aggregate of parganas called *mahals*.[1] Sher Sháh placed the Chief *Shiqdár* in charge of each *sarkár*. Akbar appointed *Subahdárs* in the provinces. In the time of Sher Sháh the Chief Munsif (*Munsif-i-Munsifán*) was responsible for civil administration; Akbar appointed *Mír-i-'Adl* for the same purpose. Sher Sháh entrusted the criminal justice to the *Shiqdár*; Akbar to the *Subahdár* and *Foujdár*.

The predecessors of Akbar employed a number of Qáẓis, Muftis and Muhtasibs for the administration of

[1] V. Smith: "Akbar the Great Mughal," p. 371.

justice; he retained them, and added to the state-machinery the offices of the *Wakil*, the *Wazir*, the *Diwán-i-Kul*, the *Mir-i-Saman*, the *Bayutát*, the *Sadr-i-Jahán*, the *Bakhshi*, the *Sadr*, the *Mustafy*, the *Amin*, the *'Amil*, the *Tepukchi*, the *Mushrif*, the *Mir-i-Mahal*, the *Mir-i-Bahr*, the *Mir-i-Bar* and many other officials whom the author of the *A'yin-i-Akbari* has mentioned in the preface of his work. These offices will be explained in their proper places.

Akbar's Idea of Justice.

Speaking of this Emperor Mr. Vincent Smith quotes from the *A'yin-i-Akbari* the saying of Akbar, "If I were guilty of an unjust act, I would rise in judgment against myself," and then observes—" The saying was not merely a copy-book maxim. He honestly tried to do justice according to his lights in the summary fashion of his age and country. Peruchi following the authority of Monserrate declares that 'as to the administration of justice, he is most zealous and watchful.........In inflicting punishment he is deliberate and after he has made over the guilty person to the hands of the judge and court to suffer either the extreme penalty or the mutilation of some limb, he requires that he should be three times reminded by messages before the sentence is carried out.' "[1]

From the above quotation one need not run away with the idea that the Emperor used to inflict only two kinds of punishments, *viz.*, of death and mutilation of some limbs. For we find in the *A'yin-i-Akbari* the

[1] Vincent Smith: " Akbar the Great Mughal," p. 344.

following instructions to the Subahdár (Provincial governor): "He should strive to reclaim the disobedient by good advice. If that fails, let him punish with reprimands, threats, imprisonment, stripes or even amputation of limbs; but he shall not take away life till after the most mature deliberations........ Those who apply for justice let them not be inflicted with delay and expectation. Let him shut his eyes against offences and accept the excuse of the penitent .... Let him object to no one on account of his religion or sect."[1]

Elphinstone points out that "a letter of instructions to the governor of Gujrát preserved in a separate history of that province, restricts his punishments to putting in irons, whipping and death; enjoining him to be sparing in capital punishments, and, unless in cases of dangerous sedition to inflict none until he has sent the proceedings to court and received the emperor's confirmation; capital punishment is not to be accompanied with mutilation or other cruelty."[2]

Mode of Trial.

The judicial officers such as the Chief Qáẓi, the Qáẓi and the Mir-i-'Adl used to try cases according to the Muhammadan law as far as it was applicable to Muslims and non-Muslims respectively; and in conformity with the Common law, *i.e.*, edicts, ordinances and instructions issued by the Emperor. These officers as usual with them followed the procedure laid down in the books of *Fiqah* (*vide* Chapter IX, Secs. i and ii).

1 "A'yin-i-Akbari," Vol. II, pp. 254.
2 Elphinstone: "History of India," pp. 532-33

The Subahdár and the Foujdár being lay-judges used to take the help of the Qáẓi and the Mufti, and follow the rules laid down for their guidance in the *Sháhi Farmáns*. The Revenue officers were guided solely by the rules framed by the authority for their guidance. The *A'yin* gives the following directions to the Qáẓi and the *Mir-i-'Adl* for trial of cases: "He shall begin with asking the circumstances of the case and then try it in all its parts. He must examine each witness separately upon the same point, and write down their respective evidence. Since these objects can only be effectually obtained by deliberateness, intelligence and deep reflection, they will sometimes require that the cause should be tried again from the beginning and from the similarity or disagreement, he may be enabled to arrive at the truth."[1]

Trial by the Emperor in person.

Akbar used to decide suits and hear appeals at his *Daulat-khánah* (the Chamber of Audience in the Palace) "generally after 9 o'clock in the morning when all people are admitted." But "this assembly is sometimes held in the evening and sometimes at night. He also frequently appears at a window which opens into the *Daulat-khánah* and from thence he receives petitions without the intervention of any person, and tries and decides upon them. Every officer of government represents to His Majesty his respective wants, and is always instructed by him how to proceed. He considers an equal distribution of justice, and the happiness of his subjects as essential

[1] "A'yin," Vol. I, p. 258.

to his own felicity, and never suffers his temper to be ruffled whilst he is hearing cases."[1]

It appears from the records of history that when the Emperor sat in the *Daulat-khánah* to hear cases, the nobles, the law officers of the Crown, the *Darogha-i-'adálat* (Superintendent of the Court), the clerks and scribes used to attend the Emperor's court. Cases were decided and decision pronounced in consultation with the law-officers and the *wazirs*. His order and decrees were communicated to the proper authorities for execution under the seal of the Court. The scribe used to take down notes, and the *Mir-Munshi* to draw up proper order under the direction of the *Mir-i-'Adl*. When the judgment and order were to be despatched to the Subahdár or the Provincial Governor for execution, they were fair-copied and sent under the Imperial seal.[2]

As to the mode of hearing cases by the Emperor in person, Mr. Smith has made the following absurd observations:

"The Emperor occasionally called up civil suits of importance to his own tribunal. No record of proceedings, civil or criminal, were kept, everything being done verbally, and no sort of code existed, except in so far as the persons acting as judges thought fit to follow Quránic rules. Akbar and Abul Fazl made small account of witnesses and oath. The governor of a province was instructed that in judicial investigations, he should not be satisfied with witnesses and oaths, but pursue them by manifold inquiries by the

[1] "A'yin," p. 134.

[2] Prof. Sarkár: "Mughal Administration," Chap. XII, pp. 24-3 ·

study of physiognomy and the exercise of forethought nor laying the burden of it on others, live absolved from solicitude."

Smith's observation absurd.

The observation of Mr. Smith is very astounding. If everything was done verbally how were the Emperor's orders communicated to the authorities either at the capital or in the *Subáh* for execution? In deciding appeals often had he to reverse the decision of the lower court, or of the provincial governor. How could the decision of the Emperor have been communicated unless it was reduced to writing? As to "the Quránic rules" the learned historian ought to have known that Al-Qurán does not contain the rules of procedure and the law of evidence. They were propounded and elaborately worked out by the Muslim jurists. All these have been embodied in the books of *Fiqah*. The Qáẓis and other judicial officers whom Mr. Smith refers to as "the persons acting as judges," were bound by the *Shará* to follow the prescribed procedure and prepare *Mazáhir* and *Sijilát*, *i.e.*, records of proceedings and decrees in proper forms (*vide* Chapter IX). As to his remark that no sort of code existed, it is not at all correct. Quite a large number of legal treatises, digests and commentaries did exist at the time of Akbar and have been in existence all along since the foundation of the four schools of Muslim jurisprudence.[1] In addition to these there were the "Institutes" of Taimur, Bábar,

[1] *Vide* A. Ali's "Introduction to Muhammadan Law," Vol I, pp. 17-21, where the name of a number of law-books is mentioned; also *vide* Morley's "Digest," I, Introduction.

and Akbar, and they contain the edicts, ordinances and farmáns of those sovereigns. The judicial officers[1] used to decide cases with the aid of those books and farmáns. The strange part of Mr. Smith's remark is that he has not cited any authority in support of his quaint views. His observations are as absurd as they are incredible. Moreover, they are contrary to the facts of history.

Trial by Ordeals.

Akbar adopted sometimes the ancient method of trial by ordeals. This was, no doubt, one of the modes of trial prevalent in India during the Hindu period. No other Muslim monarchs adopted this mode of trial. Akbar encouraged it, most probably at the instance of his Hindu officials, specially the learned Bráhmans who assisted the Emperor in the trial of cases of the Hindu subjects. Smith points out that "Akbar encouraged the use of trial by ordeals in the Hindu fashion."

In the Mediaeval Age this form of trial was also prevalent in some parts of Europe.

It is really strange that the *A'yin-i-Akbari*, that ambitious work of Abu-l-Fazl which gives many details of the Emperor's household affairs and of his government, does not give any account of the judicial machinery, or the mode of administration of justice, either at the capital, or in the provinces. The *A'yin* simply mentions the designation of a few Executive, Judicial and Revenue officers, and notes a body of instructions

[1] Al-Badáyuni mentions the name of the eminent Judges who occupied the position of the Qázi, Mir-i-'adl. Sadr-i-Jahán and Mufti during the reign of Akbar; *vide* Ranking's translation, Vol. III, Chap. II, p. 109, also Azad : "Darbar-i-Akbári," p. 740.

for their guidance. But we gather from the records of history that there were regular courts of justice both at the capital as well as in the provincial and district towns. Those courts—civil and criminal—may be graded as under:

TABLE II.

In the Capital.

Tribunals.		Presiding Officers.
1. The Royal Court	...	The Emperor.
2. Diwán i-'Adálat or the Court of the Diwán.	...	The High Diwán or the Chancellor.
3. The Court of the Chief Judge	...	The Qáẓi-ul-Quẓát.
4. The Chief Court of Justice	...	The Mir-i-'Adl.
5. The Court of Canon Law	...	The Qáẓi.
6. The Court of Common Law	...	The 'Adl.

7. The Office of the Muhtasib—who held no regular court but exercised the quasi-judicial power of the Police and the Municipal Officer (*vide* Chapter XII, *Muhtasib*).

In the Provinces.

Tribunals.		Presiding Officers.
1. The Court of the Subahdár (popularly known as *Nizámat 'Adálat*).		The Subahdár or Názim.
2. The Court of the Foujdár	...	The Foujdár.
3. The Court of the Chief Qáẓi (in some provinces only).		The Qáẓi-ul-Quẓát.
4. The Court of the Diwán	...	The Provincial Diwán.
5. The Court of Canon Law	...	The Qáẓi.
6. The Court of Common Law	...	The 'Adl (Civil Judge).

The Office of Muhtasib as stated above.

CHAPTER IV

Justice during Akbar's Successors

In the previous chapter, I have given some details of the administration of justice during the reign of Akbar. It will presently be seen that the judicial machinery set up and the reforms introduced by this wise and intelligent Emperor remained almost the same during the reign of his successors. No doubt, certain changes were made. They became necessary in the light of experience, and the modifications were introduced to suit the requirements of the society. But the general character of the administration did not change. The noteworthy feature of the Mughal administration is the vigorous growth of the *Qánún-i-Sháhi* or the Common Law enunciated by the Emperors and embodied in the "Institutes" and *Dastur-ul-'amal* of the period (*vide* Chapter X).

Now let us turn to the successors of Akbar and see how they used to dispense justice, and what sort of judicial machinery existed in their time.

Description of the Royal Court.

"Both Sháh Jahán and Aurangzeb held no public court on Wednesday, but reserved that day for holding a court of law. The Emperor came direct from the *darshan* window to the *Diwán-i-Khás* (or the Hall of Private Audience) at 8 a.m. and sat on the throne of justice till midday. This room was filled with the law-officers of the Crown, the judges of Canon Law (Qázis), judges of Common Law (ádils), Muftis,

theologians (Ulamá), Jurists learned in precedents (fatwás) the superintendent of the law court (darogha-i-'adálat), and the Kotwál or prefect of the City police. None else among the courtiers was admitted unless his presence was specially necessary. The officer of justice presented the plaintiffs one by one and reported their grievances. His Majesty gently ascertained the facts by enquiry, took the law from the Ulamá and pronounced judgment accordingly. Many persons had come from far-off provinces to get justice from the highest power in the land. Their points could not be investigated except locally, and so the Emperor wrote orders to the governors of these places, urging them to find out the truth, and either to do them justice there or send the parties back to the capital with their reports."[1]

The above description gives a vivid picture of the Imperial Court of Delhi and Agra. Besides this *Sháhi 'Adálat* there were other courts of justice of which I shall speak presently.

[1] J. N. Sarkár: " Studies in Mughal India," pp. 14 and 70; also 'Mughal Administration," pp. 106-07.

SECTION I.

ADMINISTRATION OF JUSTICE IN THE REIGN OF JAHA'NGIR.

Golden Chain of the Court.

The most noticeable and attractive feature of the Royal Court were the golden chain and bells hung up by the Emperor Jahángir. One end of the chain was fastened to the battlement of the *Sháh Burj* of the fort at Agra, and the other to a stone post fixed on the bank of the river.[1] Jahángir loved to do justice and took keen interest in its administration. This device was adopted by the Emperor so that litigants and the aggrieved persons could tie their petitions to be drawn up to the Emperor and avoid the harassment of the porters and court-underlings.

Abolition of cruel punishments.

Vincent Smith points out that in India and in Asia generally appalling sentences of mutilation of limbs and flaying alive were customary. Akbar abolished the sentence of flaying alive.[2] Jahángir interdicted the cutting of noses and ears,[3] and no death sentence could be inflicted without his permission and confirmation. From the Travel of Monsieur De Thevenot we find that "all sentences of death passed whether by civil or criminal judges had to wait for execution until the Emperor's confirmation was obtained."[4]

[1] Rogers and Beveridge, p. 17.

[2] Smith : "Akbar the Great Mughal," p. 344.

[3] Institutes of Jahángir, Art. 5; Elliot's "History of India," Vol. VI, 503.

[4] "Travels of Thevenot," Vol. III, Chap. X, p. 19.

Speaking on the mode of dispensing justice by the Mughal Emperors, Prof. Sarkár observes: "But, from the nature of things, only a few plaintiffs could reach his throne and he could spare for adjudicating only a small portion of the appeals that were handed to him, though several of the Mughal Emperors, notably Jahángir, made a parade of their devotion to duty by hanging a golden chain from their palace-balcony to the ground outside Agra Fort." [1] What a fine appreciation! The Mughal Emperors were actuated with the pure motive of saving the suitors from the clutches of "the Cormorants of Law," and redressing their wrongs personally without the intervention of the court-underlings. Undoubtedly they deserve praise for their strong sense of justice. But Mr. Sarkár has nothing but sarcasm for their "devotion to duty!"

Mr. Field in his *Introduction to the Regulations of the Bengal Code* speaking on the Collector's duty, points out: "In order to afford free and easy access to justice and redress, a box was to be placed at the door of the Kachari or Court house in which complainants might lodge their petitions at any time or hour they pleased. The Collector was himself to keep the key of the box and was to have it opened and the contents read in his presence on each court-day." [2] The English Collector certainly did not make a parade of justice. Mr. Field appreciates the Collector's act of devotion to duty; while Prof. Sarkár

[1] "Mughal Administration," p. 107.

[2] "Introduction to the Regulations," p. 171.

sees through the coloured glasses of prejudice and speaks of the Emperor in a disparaging tone.

As regards the remarks that the Mughal Emperor "could spare for adjudicating only a small portion of the appeals that were handed over to him," Rai Bhárá Mal in the *Tárikh-i-Hind* points out that the Mughal Emperor (specially Sháh Jahán) was anxious to spare more time, but the number of plaints and appeals was very small, from ten to twenty a week. *Vide* Bhárá Mal's account quoted in p. 47.

One of the acts of justice which Jahángir did to his subjects was the abolition of all kinds of *abwabs* or illegal cesses "together with taxes of all descriptions which the jágirdárs of every Subah and every Sarkár had been in the habit of exacting on their own account." [1]

Institutes of Jahángir.

Wáqyát-i-Jahángiri gives the following twelve Institutes of the Emperor:—

1. Abolition of all kinds of abwábs and prohibition of exaction of cesses.
2. Regulations relating to highway robbery and thefts.
3. Prohibition of Escheat of properties left by a deceased. "His properties and effects were to be allowed to descend by inheritance without interference from any one. When there was no heir then officers were to be appointed to take charge of the property and to spend it according to the law of Islám in building mosques and

[1] H. M. Elliot: "History of India," Vol. VI, p. 493.

serais, in repairing broken bridges and in digging tanks and wells."

4. Prohibition of wine and every sort of intoxicating liquor.
5. Prohibition of taking forcible possession of others' houses and cutting off noses and ears of criminals for any offence.
6. Prohibition of *Ghasbi.*—The officers of the Khálisa lands and the jagirdárs are not to take the lands of the *raiyats* by force, and cultivate them on their own account. The Collectors of the Khálisa lands and the jágirdárs are not without permission to form connection with people in their districts.
7. Building of hospitals and appointment of physicians to attend the sick. The expenses were to be paid from the Royal Treasury.
8. Prohibition of slaughter of animals on certain days.
9. Respect to be paid to Sunday in accordance with the custom of his ancestor.
10. General confirmation of *Mansabs* and *Jágirs.*
11. Confirmation of *Aima* lands.
12. Proclamation of amnesty for all prisoners in forts and prisons of every kind.[1]

[1] H. M. Elliot: "History of India," Vol. VI, pp. 284-87.

SECTION II.

ADMINISTRATION OF JUSTICE IN THE REIGN OF SHA'H JAHA'N.

Within a short compass Dr. Muhammadullah has put an account of the administration of justice by Sháh Jahán. He says: "The reign of Sháh Jahán is notable for peace and prosperity. The French traveller Tavernier speaks of the reign of Sháh Jahán as like that of a father over his family, and being a pious Muslim abolished the ceremony of prostration which was directly against Islámic injunctions. Sháh Jahán himself heard petitions and fixed Wednesday as the day for the administration of Justice.

Court of Appeals.

"The Emperor established a regular system of appeals. From the court of first instance an appeal could be filed in the court of the Governor, or in the court of the Qáẓi of a Subah. 'If parties were not satisfied even with these decisions they appealed to the Chief Diwán, or to the Chief Qáẓi on matters of Law.'"[1]

Sufficiency of Judicial Machinery and Paucity of Litigation.

Wide was the arrangement for the administration of justice. Every Subáh (Province) had a number of courts—civil and criminal—of original and appellate jurisdiction. And every subdivision and large district-town had the courts of Qáẓis, Sadrs and Adls like

[1] H. M. Elliot: "History of India," Vol. VII, pp. 170-73.

the courts of the Subdivisional Officers, Deputy Magistrates and Munsiffs of our time. Appellate courts were generally situated in *Sarkárs* (districts) and in the capital town of each Province (Subáh). But it appears that the number of cases was not very large. The reasons for the paucity of cases and lack of litigation are obvious. In the *first* place, there was no passion for litigation. People lived a simple life unaware of law's crookedness. They never looked upon the lust of litigation as "the greatest pleasure of life in our own times."[1] *Secondly*, the country had peace and prosperity, and the people lived self-contented under a strong government. *Thirdly*, the ordinary quarrels and caste-disputes were settled by the village *Punch* which exercised great influence upon the people in rural areas. The Muslim Government never interfered with the village autonomy ; on the contrary, they encouraged it and left the rural affairs in the hand of the Village Pancháyet.[2] (*Vide* Chapter VII, Sec. ii.)

The observation of Rái Bhárá Mal in his *Lubbut-Tawárikh-Hind* regarding the paucity of litigation during the reign of Sháh Jahán is worth quoting:

[1] Prof. Sarkár looks upon the "facility for civil litigation with Government courts" as "the greatest pleasure of the villagers' life." But as a fact the litigants are forced to resort to courts under the stress of circumstances ; they seldom take pleasure in squandering their money in ruinous litigations. (*Vide* his "Mughal Administration," p. 108.)

[2]. The Village Self-Government Act was passed in 1926 under the British Rule. It has given only a nominal self-government. But the Indian village had all along enjoyed the complete village autonomy during the Muslim Rule in India.

"Notwithstanding the great area of the country, plaints were so few that only one day in the week, *viz.* Wednesday, was fixed upon for administration of justice, and it was rarely even then that twenty plaintiffs could not be found to prefer suits, the number generally being much less. The writer of this historical sketch on more than one occasion, when honoured with an audience of the King, heard His Majesty chide the Darogha of the court that although so many confidential persons had been appointed to invite plaintiffs, and a day of the week was set apart exclusively with the view of dispensing justice, yet even the small number of twenty plaintiffs could but very seldom be brought into court. The Darogha replied that if he failed to produce only one plaintiff he would be worthy of punishment.

"In short, it was owing to the great solicitude evinced by the King towards the promotion of the national weal and the general tranquillity, that the people were restrained from committing offences against one another and breaking the public peace. But if the offenders were discovered, the local authorities used generally to try them on the spot where the offences had been committed, according to law and in concurrence with the law-officers, and if any individual disatisfied with the decision passed on his case, appealed to the Governor or Diwán or to the Qáẓi of the Subah, the matter was reviewed and judgment awarded with great care and discrimination lest it should be mentioned in the presence of the King that justice had not been done. If parties were not satisfied even with those decisions they appealed to the Chief Diwán or to the

Chief Qáẓi on matters of law. Those officers instituted further inquiries. With all this care what cases except those relating to blood and religion could become subject of reference to His Majesty ?" [1]

Compare this observation of Rái Bhárá Mal who lived during the Mughal period and used to attend the Royal Court with the remarks of Prof. Sarkár:

" Every provincial capital had its Qáẓi appointed by the Supreme Qáẓi of the Empire (the Qáẓi-ul-Quẓát) ; but there were no lower or primary courts under him and therefore no provincial court of appeal " !!

Further, " the Indian villager in the Mughal Empire was denied the greatest pleasure of his life in our own times, *viz.*, facility for civil litigation with government courts of first instance close at his doors and an abundance of courts of appeal rising up to the High Court at the Capital." [2]

The above remarks of the learned Professor are as astounding as they are contrary to the facts of history. He has not quoted any authority in support of his views. Further, under the British system of administration of justice, the litigants generally have two appeals, *viz.*, from the court of first instance to the District Court, and thence to the High Court on a point of law ; but if a suit is above Rs. 1,000 or involves a question of law, then the party may go up to the Privy Council. These constitute " abundance of courts of appeal " according to Mr. Sarkár. But under the Mughal administration, the parties always had

[1] H. M. Elliot : " History of India," Vol. VII, pp. 172-73.

[2] Prof. Sarkár : " Mughal Administration," p. 108.

three appeals, *viz.*, from the court of first instance to the Provincial appellate court, then to the High Diwán, and then to the King's court. There was no bar of valuation. A lawyer will say that these provisions for appeal are sufficient. The learned Professor complains that during the Mughal period "the smaller towns and all the villages had no Qáẓi of their own, but any plaintiff living in them, if he was sufficiently rich and enterprising, could carry his suit to the Qáẓi of the neighbouring town in whose jurisdiction they lay." [1] The implication is that this was a defect of the Mughal administration. The British administrators of the modern age with all their knowledge of various systems of justice of East and West, have not thought it fit or advisable to provide a Munsif or a Deputy Magistrate "in the smaller towns and all the villages." All the British courts are situated in the districts and subdivisions. It is neither possible nor desirable to post a judicial officer in every village. The parties desirous of carrying on litigation must repair to the district or subdivisional towns. Similar was the case with the villagers during the Mughal Rule. If this was a defect, then the Government of every country in the world is defective. Prof. Sarkár's solicitude for rural justice will hardly be appreciated by the villagers themselves. Not a few of them have had a bitter experience of ruinous litigation.

[1] "Mughal Administration," p. 108.

SECTION III.

ADMINISTRATION OF JUSTICE IN THE REIGN OF AURANGZIB.

Aurangzib's idea of justice may be gathered from his letters. In one of them, written to Sháh Jahán, he says, "Sovereignty is the guardianship of the people and not for self-indulgence and profligacy" As he was a stern puritan, so was he a strict dispenser of justice. The author of the *Mirát-i-A'lam* gives the following description of this Emperor.

"He appears two or three times every day in his court of audience with a pleasing countenance and mild look, to dispense justice to complainants who came in numbers without any hindrance, and as he listens to them with great attention they make their representations without any fear or hesitation, and obtain redress from his impartiality. If any person talks too much or acts in an improper manner, he is never displeased and he never knits his brow. His courtiers have often desired to prohibit people from showing so much boldness, but he remarks that by hearing their very words and seeing their gestures, he acquires a habit of forbearance and tolerance." [1]

According to the author of *Muntakhab-ul-Lubáb*, "of all the sovereigns of the House of Taimur, nay of all the sovereigns of Delhi no one since Sikandar Lodi has ever been apparently so distinguished for devotion, austerity and justice as Aurangzib." [2]

1 H. M. Elliot: "History of India," Vol. VII, p. 158.
2 *Ibid.*

Alexander Dow in his *History of India* gives the following account of Aurangzib's mode of dealing with justice.

Corruption made a crime.

"He knew that the power and consequence of the prince depended upon the prosperity and happiness of the people; and he was even from selfish views an enemy to oppression, and encourager of agriculture and commercial industry.[1] He established a perfect security of property over all his dominions. The forms of justice were made less intricate and more expeditious than in former reigns. To corrupt a judge was rendered for the first time a crime. The fees paid in the courts of justice were ascertained with accuracy and precision;[2] and a delay in the execution of justice subjected the judge to the payment of the loss sustained by the party aggrieved."

Check upon frivolous litigation.

"The course of appeals from inferior to superior courts was un-interrupted and free; but to prevent a wanton exertion

[1] According to a class of European historians when an Indian prince or emperor does a good act, it is done with selfish motive, but when a European king or an English administrator does a beneficial act, it proceeds from a purely altruistic motive. This sort of mentality betrays their bias—their object being to applaud the kings of their own race and their deeds, and to decry the Muslim monarchs and their benevolent works. Some of the Indian historians who blindly follow the examples of the European writers have written in the same tone. Speaking of the socialistic functions Prof. Sarkár remarks that "whenever the Mughal local officers showed too active an interest in local life (outside the provincial capital) it was against superior orders and in consequence of a corrupt love of gain or spirit of partizanship." (*Vide* his Mughal Administration, p. 14.) This is a travesty of historical facts.

[2] *Vide* chapter on "Court-fee," pp. 110-11.

on this privilege the appellant was severely fined when his complaint against the judgment was found frivolous and ill-founded. The distributors of public justice, when their decrees were reversed, could not always screen themselves under the pretended errors in judgment. Should the matter appear clear, they were turned out of their offices as swayed by partiality. Aurangzib soon after his accession to the throne established a precedent of this kind. The decision has been unjust. He sent for the judge and told him in public, ' This matter is clear and obvious, and if you have no ability to perceive it in that light, you are unfit for the place as a weak man; if you suffered yourself to be overcome by presents, you are an unjust man, and therefore unworthy of your office.' Having thus reprimanded the judge, he divested him of his employment and dismissed him with ignominy from his presence."

Reference to a Bench of Judges.

" He carried his austerity and regard for morality into the throne. He made strict laws against vices of every kind. He was severe against adultery and fornication; and against certain unnatural crimes he issued various edicts. In the administration of justice, he was indefatigable, vigilant and exact. He sat almost every day in judgment and he chose men of virtue as well as remarkable for knowledge of the law for his assessors. When the cause appeared intricate it was left to the examination of the bench of judges in their common and usual court. They were to report upon any such cause as originated before the

throne, and the Emperor, after weighing their reasons with caution, pronounced judgment and determined the suit."

"In the courts of the governor of provinces, and even often on the benches on which his deputies sat in judgment, he kept spies upon their conduct. Though these were known to exist, their persons were not known. The princes, his sons, as well as other viceroys were in constant terror; nor durst they exercise the least degree of oppression against the subject, as everything found its way to the ear of the Emperor. They were turned out of their offices upon the least well-founded complaints; and when they appeared in the presence, the nature of their crime was put in writing into their hands. Stripped of their state and honours, they were obliged to appear every day at court, as an example to others; and after being punished for some time in this manner, according to the degree of their crime they were restored to favour; the most guilty were banished for life" (*i.e.* dismissed for ever).

Capital punishment unknown.

"Capital punishments were almost totally unknown under Aurangzib. The adherents of his brothers who contended with him for the empire, were freely pardoned when they laid down their arms."[1]

On the subject of punishment Pringle Kennedy, the author of the *History of the Great Mughals*, observes:

"My reader will note with surprise that Aurangzib was slow to punish, but the history of his whole reign

[1] The extracts are taken from Alexander Dow's "History of India."

shows that save in cases where he feared for his throne, particularly from his relations, he was exceedingly lenient. Pyramids of skulls had no fascination for him. We read nowhere in his reign of massacres, nor of cruelty such as is to be found in the annals of the earlier Mughals."

Dow in his *History of India* points out that though Aurangzib rewarded proselytes with a liberal hand, he did not persecute the adherents of different persuasions in matters of religion. "It does not appear," says Elphinstone, "that a single Hindu suffered death, imprisonment or loss of property for his religion, or indeed, that any individual was ever questioned for the open exercise of the worship of his fathers."[1]

Captives of war—women and children exempted.

Muhammadan Law prohibits killing or putting to death children, women, and aged men, and those who are bed-ridden, blind, decrepit, and paralytic, also men who have lost their limbs (right hand or foot) and who are lunatic, insane, etc.[2]

Aurangzib followed this rule strictly. "He never allowed the capture of women and children during war as was the common practice in Asia in those days. In all his wars and conquests the life and property of the subject were protected and respected. Prisoners of war were never punished. The great rebels and traitors were immediately pardoned on their repenting.[3] He never made slaves of the prisoners of war.

[1] Elphinstone: "History of India," p. 656.

[2] "Hidáya," Vol. II, Chap. II, pp. 148-49.

[3] Jaswant Singh and the supporters of Dárá Shukoh were pardoned and restored to favour.

In judicial matters, civil or criminal, he never interfered, and left every case to be tried by judges and decided by law according to its merits. He issued an edict[1] permitting all subjects and private persons to sue government in courts of law if they had any claim upon it and wanted satisfaction. Government advocates were appointed in every district to plead for the government in law-suits brought against it by subjects." [2]

Suit against the State.

The Shâhi *Farmáns* issued in 1772 to the Diwán of Gujrát throws a flood of light on his idea of criminal justice. Prof. Sarkár has translated the *farmán* [3] from which the following extracts are taken:

" The Emperor has learnt that local officers delay in disposing of the cases of those who are cast into prison on any charge. To prevent imprisonment without just cause the following rules are laid down :

1. When theft has been proved against any man by legal evidence before the Qázi or the accused by his confession satisfies the conditions necessary for the imposition of *hadd*,[4] the Qázi should inflict the

[1] Under Muhammadan Law the State and the subject stand on the same footing. The Caliph is regarded as one of the subjects. The Law allows the subject to sue the State. There are innumerable instances of suits being filed in the court of law against the Caliphs, the Sultans or the sovereigns. When he was summoned by the court he had to appear and take his trial like an ordinary suitor, and the decree passed against him, was enforced by the Court.

[2] Sâdiq Ali : " A Vindication of Aurangzib," pp. 142-43.

[3] This *farmán* is to be found in *Mirát-i-Ahmadi*, pp. 293-99.

[4] Not *hidd* as spelt by Prof. Sarkár but *hadd* which means " specific punishment " for certain offences.

punishment in his own presence and keep him in prison till he manifests signs of penitence for his crime.

2. When theft is rife in the town and a thief is captured, do not even after proof behead him nor impale him, as it may be his first offence.

* * * * *

4. If a man has committed theft twice and *hadd* (punishment) has been awarded on both these occasions, and then he commits theft again and it is legally proved against him (*wauchakka budah*) and this crime is habitually committed by him, then after *tazir* [1] keep him in prison till he repents. But if even this does not reform him and he commits the offence (again), give him prolonged imprisonment.

* * * *

11. If a man, suspected of theft, highway robbery, strangulation or the felonous killing of people, is arrested, and from indications (*lit.* signs) the Subahdár and the officers of the *'adálat* consider it most probable that he has often been guilty of the deed—then imprison him that he may repent. If any one charges him with any of the above offences, resort to the Qáẓi (for trial).

* * * *

27. If a *Zimmi* [2] (male or female) takes a Musalman (male or female) as his or her slave, or a *Zimmi* takes a Muslim woman or a Musalman a *Zimmi* woman other than 'the people of the Book' (*i.e.*, Jews and

[1] Corrective punishment.

[2] Non-Muslim subjects.

Christians), place the offender before the Qáẓi to act according to Canon Law.

* * * * * *

28. When a man is brought to the *Chabutra* of the *Kotwál* (Prefect of the City Police) under arrest by the Kotwál's men or revenue collectors, or on accusation by a private complaint—the Kotwál should personally investigate the charge against him. If he is found innocent, release him immediately. If anybody has a suit against him, tell the former to resort to a court. If there is any case of the Crown-land revenue department against him, report the fact to the Subahdár, take a *sanad* as suggested by the Subahdár and act accordingly. If the Qáẓi sends a man for detention, take the Qáẓi's signed order for your authority and keep the man in prison. If the Qáẓi fixes a date for trial, send the prisoner to the *'adálat* on that date; otherwise send him there every day so that his case may be quickly decided."[1]

Aurangzib did another act of justice which redounds to his credit. He abolished all kinds of *abwábs* which were in vogue throughout the country. These illegal exactions and imposts amounted to more than sixty in number. They may be grouped under the following heads:—

Abolition of illegal taxes.

(1) Imposts on the Hindus, such as taxes on bathing in the Ganges, carrying bones of dead persons for throwing them in the Ganges, Hindu fairs and festivals.

[1] Sarkár: "Mughal Administration," pp. 122-130.

(2) Fees exacted on the sale or transfer of properties, such as mortgage or sale of land, houses, slaves, etc.

(3) Duties on the sale of vendible articles and produce of land, such as milk, vegetables, oil, tobacco, etc.

(4) Tolls and perquisites of officials, such as ferry, ground-rent for stalls in markets, for grazing cattle, etc.

(5) Taxes on trades and professions, such as the calling of butchers, thatchers, brokers, watch-men, printers of cloth, etc.

(6) Exactions of forced labour, subscriptions and gifts.

Such imposts, taxes and fees were strongly denounced and prohibited again and again by the Muslim Rulers, but they did not die out. When stamped out from one part of the country, some of them reappeared in another part under different names. Not a few of them still exist as customary imposts in the Zamindars' *Sheristahs*. Some of them have got the sanction of law, such as the landlord's fee on devolution of property, and the *chouth* on transfer of land. In addition to these, people have to pay—

(1) Tolls on ferries, *hats*, bridges, etc.

(2) Octroi duties on green and dry fruits.

(3) License-taxes for carrying on trade and profession, keeping horses, etc.

(4) Income tax and Super-tax.

(5) Duties for plying boats in rivers and canals.

(6) Road cess and other kinds of cesses.

(7) Death-taxes or death-duties.

(8) *Salámi* and *Nazrána.*
(9) Tolls at burial grounds and burning ghats.
(10) Fees from practitioners and professional men.
(11) Taxes on petrol, kerosene oil, sugar, tea, paper, etc. (*vide* the list of taxed articles in the Finance Member's Bill introduced in the Legislative Assembly in 1930-31).

If we enumerate all the illegal and legalised taxes, cesses, imposts, tolls, license-fees and various duties levied by the Municipality, the District Board, and other Local Bodies, as well as by the Government under direct and indirect taxation, their number will hardly be less than that of the taxes and duties which were prevalent during the Mughal period. Not a few of the Muslim sovereigns, as we have seen above, denounced many of these taxes and duties as illegal as the present Government do, yet we find that such or similar taxes are often imposed and realized in different circumstances under a colour of legal sanction.

CHAPTER V

SECTION I.

The Chief State-officials (Arkán-i-Daulat).

In the foregoing chapters, I have given a short sketch of the Administration of Justice by the Sultans and Emperors of India. It will be interesting to know what sort of executive and judicial machineries existed during their reign. In giving a brief account of the high functionaries who were known as *Arkán-i-Daulat* "the pillars of the State," I am obliged to take some notice of the Revenue Department as its chief officials were also included among the *Arkán-i-Daulat.*

I. On the *Administrative Side* we find the following state-officials:—

(1) *Wazir* or the Prime Minister.—He was the head of the Revenue Department in his capacity of Diwán. In this sense he may be called the Chancellor, but he was not Diwán properly so-called. On many ceremonial occasions he acted as the representative of the Emperor. Originally, Wazir's office was civil and not military, but he used to assume military command when the monarch happened to be minor or incompetent.

(2) *Diwán* or the Chancellor of the Exchequer.—He was essentially a civil officer and used to preside over the Treasury. The Chief Diwán was called the *Diwán-i-'Alí,* or the

High Chancellor. Sometimes he was also called Wazir as an intermediary between the Emperor and the rest of the state-officials. He had two naibs or deputy diwáns under him—one is called *Diwán-i-Khálisa* or the Diwán of Crown lands, and the other *Diwán-i-tan* or the Diwán of salaries. In some respects the office of the High Diwán was more important than that of the Wazir for—(1) the Diwán's written sanction was necessary for high appointments, promotion, leave and large payment ; (2) the Provincial Diwáns were controlled and guided by him from the capital ; and (3) no important documents (including the Emperor's orders or true copies thereof) were regarded valid without the seal and signature of the High Diwán.

It should be borne in mind that the Diwán when authorised by the Emperor, used to hold court, and that appeals lay to his court from the court of the first instance.

(3) *Bakhshi* or the Pay-Master.—Although the term signifies an officer of the Military Department, he was more a civil official than a military. He was the pay-master of the army. A Bakhshi was attached to each provincial army. The chief Pay-master was called the *Mir Bakhshi*. His office resembles that of the Accountant-General. His duty was to examine accounts and pass bills for payment.

There were several Bakhshis under the Chief Bakhshi.

(4) *Khán-i-Saman* or the High Steward.—He was the head of the Emperor's household and had charge of the whole expenditure of the Royal Establishment. His office was of great trust, and his position was just below that of the High Diwán. In fact, he was the second man in the realm.

(5) *Buyutát* or the officer whose duty was to register the assests and effects left by the deceased persons with a view to realize the dues of the state and to protect the property for the heirs of the deceased. In addition to other duties he looked after the escheats in co-operation with the Khán-i-Saman.

II. On the *Judicial and Executive Side* we find the following state-officials, some of whom were included among *Arkán-i-Daulat* (the pillars of the State) :—

(1) *Mir-i-'Adl* or the Chief Justice.—The post of this judiciary was created during the reign of Sultán Sikandar Lodi. Since then his office was retained. His court was the chief court of appeal. But his duties as the Chief Judicial Officer varied from time to time. For the history of *Dár-ul-'Adl* "the Court of Judicature," *vide* Chapter XII.

(2) *'A'dil* or the Dispenser of Justice.—He was the civil judge of the court of Common law and authorized to deal with certain classes

of cases which did not fall within the cognizance of the Qáẓis. Some writers characterize *'ádils* as lay judges, and their courts as lay tribunals as contradistinguished from the *Shara'* court of the Qáẓi.

(3) *Qáẓi* or the judge of the court of Canon as well as of Common Law. As to his duties and powers, *vide* Chapter XII. The Qáẓi used to hold the *Shara'* court in addition to his other judicial and executive functions. In Egypt such a court is called the *Mehkemeh Sheraieh* in the Turkish fashion of pronouncing the Arabic term *Mahkum-i-Shari'yah*.

Prof. Sarkár has quoted in his *Mughal Administration* (page 27 footnote) two Marathi *sanads* of the middle of the seventeenth century which "give the duties of Qáẓis in the Deccan as trying law-suits, putting down oppressions and quarrels, arranging for the marriage of orphan girls, dividing the heritage of dead men according to Canon Law, writing out the papers of *chakbandi* and Canon decisions. Some of these Qáẓis were also *Muhtasibs* (censors), and had to discharge the duties of the latter in addition."—(Mawjee and Parasnis, *Sanads and Letters*, pp. 79 and 81.)

(4) *Qáẓi-ul-Quẓát* or the Chief Judge.—He was the Supreme Judge of the Empire, and also "the Qáẓi of the Imperial Camp." "He always accompanied the Emperor. Every city and even large village had its local Qáẓi who was appointed by the Chief Qáẓi."

His court was the chief criminal court of appeal (*vide* Chap. XII). He was not debarred from deciding original suits. But his main function was to hear appeals from the subordinate courts.[1]

(5) *Sadr* or the Civil Judge.—His duty was to maintain lists of rent-free lands and daily allowances to pious men, scholars and *darvishes*, to supervise the endowments created by the Emperor and the princes for charities, and to see that the grants were rightly applied to the purposes for which they were made ; further he was required to note deaths, and scrutinize the applications for fresh grants. Some *Sadrs* were empowered to try civil cases also.

(6) *Sadr-i-Jahán* or the Chief Civil Judge.—He was also called *Sadr-us-Sadur* and *Sadr-i-Kul*. His duty was to appoint *sadrs* in the provinces. The distribution of charities was made by the Emperor through the Chief Sadr ; he was the almoner of the Emperor and had the charge of spending large sums of

[1] Sarkár : "Mughal Administration," p. 27. But the same author in page 108 complains that "the smaller towns and all the villages had no Qázis of their own." He expects that the Muslim sovereigns should have posted Qázis in *small towns* and *all the villages* in India. Has the British Government with its elaborate system of administration, posted Munsifs and Deputy Magistrates in small towns and all villages ? No Government can possibly make such arrangement, except perhaps the king of Utopia. The author's other remarks in that page are quite uncalled for and unwarranted.

money during the month of Ramaḍán and court ceremonies. In addition to the above function, he used to try civil suits and hear appeals when empowered to do so.

(7) *Muhtasib* or the Censor of public morals.—He was the prefect of the city police and supervisor of public morality. His main duties were—(1) to control the sale of wine and other intoxicating drugs in open public places, to stop the practice of gambling and the commission of nuisance and indecent acts in public resorts; (2) to supervise markets and streets, and examine weights and measures; (3) to test articles of food and forbid the sale of adulterated vendibles; (4) to detect counterfeit wares in sale; (5) to remove obstruction from the street; (6) to grant permission for the erection of balconies, projections to buildings and latrines, provided they would not cause any interference with the public traffic; and so forth.

The Municipal police was under the Muhtasib and with its help he used to enforce his orders within the limits imposed by law (*vide* Chapter XII).

The instructions given to a newly appointed *Muhtasib* (Censor) by the Emperor Aurangzib throws a flood of light on the functions of this officer:

" In the bazárs and lanes observe if any one, contrary to the regulations and customs, has screened off (*abru*) a part of the street, or closed the path or thrown dirt and sweepings on the road, or if any one has

seized the portion of the bazár area reserved for public traffic and opened his shops there ; you should in such cases urge them to remove the violation of regulations.

" In cities do not permit the sale of intoxicating drinks, nor the residence of ' professional women ' (*tawaif*, lit. dancing girls) as it is opposed to the Sacred Law.

" Give good counsel and warning to those who violate the Qûránic precepts. Do not show harshness (at first), for then they would give you trouble. First send advice to the leaders of these men, and if they do not listen to you then report the case to the Governor" (*Manual*, pp. 47-48; *vide* Sarkár: "*Mughal Administration*," pp. 30-31).

SECTION II.

DESCRIPTION OF THE QÁẒI'S COURT—MODE OF TRIAL.

The following description of the court of the Qáẓi may be gathered from the *Fatwá-i-'Alamgiri* and other contemporary records of history.

A scene of the Qáẓi's court.

In a quadrangle stands the imposing building called *Dár-ul-Qaẓa* 'the Court of Justice.' The *Iwán-i-'Adálat* contains a capacious hall where the Qáẓi holds trial. The side-rooms are for the court-officials and court-records. On one side of the big hall is a raised platform (*takht*) covered with rich carpet (*qálin*). This is the seat for the Qáẓi. On his right and left are the seats for the *Mufti* and *Ulamá*. A carved ivory (and sometimes highly polished wooden) ink-stand and a desk of polished wood for writing, are placed before the Qáẓi. The floor of the hall is covered with carpets. In one side facing the Qáẓi's seat is the seat of the clerk of the court (*Kátib*). In another side is the seat of the Court *Vakil* (the Government Advocate). In front of the seat of the Qáẓi is a table covered with coloured cloth. On this table are heaped up records and files (*muházir* and *sijilát*), plaints and petitions. In front of the Qáẓi and on the floor sit the parties in two distinct rows. The witnesses and partizans of the litigants sit at the end of the hall. The *Daroghá-i-'Adálat* (the Superintendent of the court) who is in charge of the records brings the files required by the

Qáẓi. The court peons and orderlies control the crowd.

The plaintiff goes straight to the *Kátib*, and either hands over the plaint, or states orally the facts of his case. The *Kátib* writes out the plaint in the court register and notes down the name of the Qáẓi in whose court the case is to be tried. The names and addresses of the parties and of their fathers as well as the particulars of the case are entered in the register. The court sits from the morning till noon.[1]

Mode of trial.

When the Qáẓi with his attendants enters the hall, the audience stands up and bows in obeisance. He goes through the record to see if it is in order. If not, it is returned. The plaintiff or his Vakil then states his case. If the defendant is present he will be called upon to state his defence. If the defendant admits the claim, the case is decided in accordance with law, and the decree is to be drawn up in conformity with the *mahzur* (record of proceedings) and *sijil* (form of decree). If the defendant denies the plaintiff's claim, then two courses are open to the plaintiff, *viz.*, either he may produce evidence to prove his claim, or he may put the defendant on oath. If he refuses to take oath, and if the plaintiff's witnesses are present, they are

[1] The Imperial Regulation of Aurangzib urges opon " the judges to sit in their offices on Saturday, Sunday, Monday, Tuesday and Thursday, *i.e.*, five days, while on Wednesday they should attend the Subahdár, and Friday alone should be a holiday. From two *gharis* (about an hour) after daybreak to a little after midday (*i.e.*, when the sun has begun to decline), the judges should sit in the court room and do justice, and go to their homes at the time of the *zuhr* prayer"—*Mirat-i-Ahmadi*, p. 291 ; *vide* Sarkár's " Mughal Administration," p. 117.

examined. The defendant then enters his plea by way of avoidance and is required to prove it by evidence. Both parties are entitled to an adjournment of the case for summoning their witnesses.[1]

As the trial proceeds the Qáẓi is to take down the evidence of the party and his witnesses. He may ask the *Kátib* to note their names and addresses. If for any reason the Qáẓi is unable to take down the depositions, he may ask the *Kátib* to do so. But the law of procedure requires that the Qáẓi should himself take down the depositions. The witnesses are to be examined separately so that one may not know the statements of the other.[2] Cross-examination is allowed.[3] The court may also put questions to elicit facts and test the veracity of the parties and their witnesses. Then after going through the evidence, if the Qáẓi finds that plaintiff has established his claim, he enters judgment in his favour. A decree follows and is drawn up in accordance with the prescribed form.

The whole proceedings form a record called *mahzur* and the decree which forms the part of the record is called *sijil*. It is necessary for the validity of the decree that *sijil* must conform to *Mahzur*.[4]

As to constitution of the Court and the Full Bench, *vide* Chap. VI.

As to Appeal and Revision, *vide* Chap. VI.

1 Hidáya (Grady), p. 451.

2 *Al-Qaza fil Islám*, p. 66.

3 *Ibid*, pp. 73-74, where the mode of cross-examination is pointed out.

4 *Fatáwa-i-'A'lamgiri*, Vol. VI, p. 247.

As to Limitation, *vide* Chap. IX, Sec. iv.
As to Court-fee, *vide* Chap. IX, Sec. iv.
As to *exparte* decree, *vide* Chap. IX, Sec. ii.
As to Arbitration, *vide* Chap. IX, Sec. ii.

Table No. III.

Gradation of Courts.

(During the Mughal Period).

In the Capital.

	Tribunal.	Presiding Officer.
1.	The Royal Court	The Emperor.
2.	Diwán-ul-Mazálim	

Court of Canon Law.

(Adálat-i-Shari'ya)

	Tribunal.	Presiding Officer.
1.	The Chief Court of the Qáẓi ...	The Qáẓi-ul-Quẓát.
2.	The Subordinate Court of the Qáẓi	The Qáẓi.
3.	The Subordinate Court of the Deputy Qáẓi	The Naib Qáẓi.

Court of Common Law.

	Tribunal.	Presiding Officer.
1.	The Court of the High Diwán ...	The Diwán-i-'Alá
2.	The Court of the Mir-i-'Adl ...	*Mir-i-'Adl* or the Chief Justice.
3.	The Court of the Sadr-i-Jahán ...	The Chief Sadr (Judge).
4.	The Subordinate Court of the *'Adl*	The 'Adl (Civil Judge).
5.	The Subordinate Court of the Sadr	The Sadr (Civil Judge)

Note.—(1) The High Diwán was more concerned with the appointment and disposition of the high officials and judiciaries than with the trial of cases, but he had the power to try cases, especially to hear appeals, as appeals lay to his court from the court of first instance.

(2) The Sadr and the Sadr-i-Jahán were directly connected with the management of the endowed properties and rent-free lands, as also with the distribution of charities and stipends. They used to decide cases of dispute relating to these matters. They also tried ordinary suits when authorized to do so.

(3) The Mufti had no independent court of his own, but was generally attached to the ordinary court of justice for giving legal opinion.

(4) The Muhtasib or the Public Censor had his office and exercised *quasi*-judicial powers but did not hold any regular court. But when invested with the powers of a Qáẓi, he could try only a particular class of cases. His ordinary duties were to investigate the cases of infringement of Municipal law and police regulations. (*Vide* Chap. XII.)

(5) *Diwán-i-Mazálim.*—This was a Board for the Investigation of Grievances. This institution has a history of its own. Originally it was the highest Criminal Court of Justice

and exercised control over the judiciary. Its "function was to set right cases of miscarriage of justice which occurred in the administrative and judicial departments." (*Vide* Chapter XII, where its origin and history have been traced.) But this Board was not established in India till the reign of Aurangzib. He preferred to call it *Diwán-i-Mazálim* although its real name was (*Ad-Diwán-un-Nazr fil Mazálim*. During the time of Aurangzib, this Diwán became the highest court of justice presided over by the Emperor himself.

CHAPTER VI

SECTION I.

Appeal and Revision.

Maráfi'at.

In the original books of Muhammadan Law the word *Maráfi'at* is used. Its meaning is to "take a case before a judge," "to carry on a law-suit." The word, therefore, includes both appeal and revision.

According to Muhammadan Law the Qáẓi or the judge has power to hear appeal both on fact and law. But it appears from the observation of certain jurists that the Qáẓi of a higher court can revise the decision of a lower court on a point of law also.[1]

From "A History of India as told by their own Historians" we find that the Muslim monarchs—especially the Mughal Emperors—established regular courts of Appeal and Revision. The *Lubbat-i-Tawá-rikh-i-Hind* gives the following facts:

"But if the offenders were discovered, the local authorities used generally to try them on the spot where the offences had been committed according to law and in concurrence with the officers; and if any individual, dissatisfied with the decision passed on his case, appealed to the Governor or the Diwán or

[1] *Sharh-i-Viqáya*, Chapter III, Discussion on *Maráfi'at*; Dr. Muhammadullah: "Administration of Justice in Muslim Law," p. 67.

to the Qáẓi of the *Subah,* the matter was reviewed and the judgment awarded with great care and discrimination...If parties were not satisfied even with these decisions they appealed to the Chief Diwán or to the Chief Qáẓi on matters of law." [1]

From the above facts it is clear that there were courts of different grades for appeal and revision.

Review of Judgment.

Under the Muhammadan Law the Judicial Officers, such as the Qáẓi, has the power of reviewing (*ruyat*) his judgment or decree. If he finds that it is in violation of the principle of law he may revise it or hear the case over again.[2]

" The law allows a review (رؤية—*ruyat*) of decree in cases where it is in violation of the principle of law ; the case will then be heard over again." [3]

Similarly, he has the power of correcting accidental or clerical error or arithmetical mistake.

[1] H. M. Elliot : " History of India," Vol. VII, pp. 172, 178.

[2] *Sharh-i-Viqáya*, Vol. III, section on *Maráfi'at.*

[3] A. Rahim : " Muhammadan Jurisprudence," p. 372.

SECTION II.

Constitution of a Court.

The special feature of the constitution of an ordinary Islámic court is that it is always composed at least of two judicial officers, *viz.*, the presiding officer and the Mufti, and sometimes even more than two, *viz.*, some 'Ulamá (the learned in law) who are to help the presiding officer in addition to the Mufti.[1] The Muhammadan Law also allows the appointment of two Qáẓis to sit together for trying cases. In such circumstances one of them alone has no power to decide a cause. They are required to act conjointly.[2] Thus the Islámic court by its very constitution, gives the parties the advantage of having their cases decided by a Bench of Judges, or by the Judge with the aid of assessors. This is unlike the British court of justice in which one officer only decides a suit, except the High Court which ordinarily forms a Division Bench for hearing appeals only.

Constitution of a Full Court.

Reference.

It appears from the records of history as well as from the Legal Treatises that a sort of Full Bench existed. The rule of the Muhammadan Law is that the Qáẓi should consult the Mufti, on the point of

[1] *Muqárinát wal Muqábilát*, p. 29.
[2] *Ibid.*

law. But if he disagrees with the opinion of the Mufti, he must refer the matter either to the higher court for decision, or to a Full Court consisting of the Qáẓi, the Mufti, the Muhtasib and the learned in law. After a discussion their opinion is held binding upon the Qáẓi.

This procedure is suggested in a letter of the Committee of Circuit to the Council at Fort William dated the 15th August, 1772.

" The Cazee is assisted by the Mufti and Muhtasib in this court. After hearing the parties and evidence, the Mufti writes the *Fatwa* or the law applicable to the case in question, and the Cazee pronounces judgment accordingly. If either the Cazee or Muhtasib disapproves of the *Fatwa*, the case is referred to the Nazim who summons the Ijlass or General Assembly, consisting of the Cazee, Mufti, Muhtasib, the Darogha of the Adawlat, the Moulavis and all learned in the law, to meet and decide upon it. Their decision is final."

The letter throws a flood of light on the mode of Reference and holding a full court. Compare with this the description of the full court of the Mughal Emperors in Chapter IV. The *Sharh-i-Viqáya* points out that when a complicated point of law arises the Qáẓi can refer it to another Qáẓi for his opinion. But if the Qáẓi differs from the opinion of the second Qáẓi, or if the opinion of the latter conflicts with a well-known juristic principle, the matter may be referred to a third Qáẓi [1] for his opinion.

[1] *Sharh-i-Viqáya*, Vol. III, section on *Maráfi'at*.

TABLE NO. IV.

Grades of Appellate and Revisional Courts.

In the Capital.

	Court	Jurisdiction
1.	The King's Court	Appeals from all courts.
2.	Diwán-i-Mazálim	
3.	The Court of the High Diwán.	Appeals from the Subordinate Civil Courts.
4.	The Court of Mír-i-'Adl.	Civil appeal from the Court of the 'Adl.
5.	The Court of the Chief Qáẓi.	Civil and Criminal appeals from the Court of the Qáẓi.
6.	The Court of the Sadr-i-Jahán.	Appeal from the Court of the Sadr.

Note.—(*a*) As the Qáẓi used to try criminal as well as civil cases relating to marriage, inheritance succession, etc., the Chief Qáẓi had power to hear appeals relating to such civil matters.

(*b*) The Sadr-i-Jahán had the power of hearing appeal from the subordinate court of the Sadr and the Qáẓi when authorized to do so.

(*c*) The court of the subordinate Qáẓi can revise the decision of another Qáẓi when empowered to do so.

(*d*) The courts having the power of hearing appeal had also Revisional Jurisdiction.

In the Province or Subah.

First Appeal.

1. The Court of the Názim	Appeals from Criminal Courts.
2. The Court of the Diwán	Appeals from the Subordinate Civil Courts.
3. The Court of the Chief Qáẓi.	Appeal from the Subordinate Court of the Qáẓi.

No death sentence could be executed without the confirmation of the Emperor.[1]

A second appeal was allowed from the Provincial appellate court to the High Diwán, or the Mír-i-'Adl, or the Qáẓi-ul-Quẓát in the capital according to the nature of the appeal.

If the parties were not satisfied even with the decision in the second appeal, they could go up to the Royal Court which was the highest Court of Appeal in the land.

[1] One of the Institutes of Jahángir says: "In the event of any person being sentenced to death notwithstanding that the orders might be imperative, yet they should not be carried into effect till sun-set, and if up to that time no reprieve should be issued the punishment should then be inflicted on the criminal." Elliot: "History of India," p. 361. Akbar passed a similar order; *vide* Elphinstone: "History of India," p. 532.

CHAPTER VII

SECTION I.

PROVINCIAL ADMINISTRATION.

The Province was in charge of a Názim popularly known as Subahdár. He was the Vice-regent of the Emperor. He was not only a Viceroy, but also the Commander of the provincial army. He was the Sipahsálár or the Commander-in-Chief. "The troops and subjects of the Subah are under his orders; and the prosperity thereof depends upon his impartial distribution of justice."

The judicial and administrative machinery of the provinces which regulated and controlled the government, was an exact counterpart of that of the Central Government. On the *Administrative side* the government was conducted by the Subahdár, the Diwán, the Foujdár, the Kotwál, the Bakhshi, the Buyutát, the Diwán-i-Khálisa (Crown lands) and the Daroghá of the province and district towns.

On the *Judicial side* we see the Qáẓi, the Mufti, the Sadr, the 'Adl, and the Muhtasib; we further find that in large and important provinces, the Chief Qáẓi and the Mír-i-'Adl were sometimes appointed, and sometimes they acted like the Circuit Judges.

In addition to the *mansabdárs* we find a host of smaller officials, *viz.*, the Krori, the Tahsildár, the Amin, the Qánungo, the Fotahdár, the Patwári, the

[1] Áyin-i-Akbari, Vol. II, p. 253.

Kárkun, the 'Amil, the Tahsildár of the mahal, the Khazánchi and the Sizáwal.

They were essentially rural officers though they had to do the urban work also according to their turn of duties, or the stations where they were posted or transferred.

But no province enjoyed the privilege of having a Wazir or Khán-i-Saman (high Steward).

Table No. V.

In the Provinces.

(During Mughal Period.)

The Court of Common Law.

	Tribunal.	Presiding Officer.
1.	The Nizámat 'Adálat (Chief Criminal Court).	The Subahdár.
2.	The Diwán-i-'Adálat (Chief Civil Court).	The Diwán.
3.	The Foujdári 'Adálat (Criminal Court).	The Foujdár.
4.	The Subdivisional Court of the Foujdár.	The Foujdár of the Sub-Division.
5.	The Subordinate Civil Court of the Sadr.	The Sadr (Civil Judge)
6.	The Subordinate Civil Court of the 'Adl.	The 'Adl (Civil Judge).

The Court of Canon Law.

	Tribunal.	Presiding Officer.
7.	The Court of the Chief Qáẓ	The Qáẓi-ul-Qûẓát.
8.	The Subordinate Court of the Qáẓi.	The Qáẓi.
9.	The Subordinate Court of the Náib Qáẓi.	The Náib Qáẓi.

Note.—(1) The Courts of the Subahdár and the Foujdár had criminal jurisdiction, while those of the Diwán, the 'Adl, and the Sadr were of civil nature. The court of the Qáẓi had both civil and criminal jurisdiction. The Náib Qáẓi was practically the assistant of the Qáẓi and acted under his direction.

(2) All the Provinces had not the court of the Qáẓi-ul-Quẓát or of the Mír-i-'Adl. They had their courts in large and important provinces only. Sometimes the Chief Sadr (Sadr-i-Jahán), and the Chief Qáẓi (Qáẓi-ul-Quẓát) acted as circuit judges.

(3) It should be borne in mind that the Qáẓi, the 'Adl, and the Sadr derived their jurisdiction from the powers and authority mentioned in their letter of appointment. Consequently, they performed other functions also. Some of them were not vested with the power of trying cases. Some of the Qáẓis were vested with quasi-judicial powers and entrusted with the duty of looking after waqf properties, unclaimed properties, the properties of the minor, the missing person, etc. (*vide* Chapter XII). The main duty of the Sadr was to look after pensions and charities and dispose of petitions for stipends, and that of some of the 'Adl to look after revenue cases.

(4) The designation of Munsif was in vogue during the reign of Sher Sháh, but we do

not find it in use during the Mughal period. Instead of Munsif we find the designation of " Sadr " and " 'Adl " for civil judges. Most probably they resemble the Subordinate Judge and Munsif of our time. The subordinate judge is generally known as Sadr-i-'Ála.

(5) The court of the Subahdár, or the Názim was the chief court of criminal appeal ; while the court of the Diwán was that of civil appeal. The other courts were the courts of First Instance. The Sadr heard appeals when vested with the power of an appellate court (*vide* Chapter VI on Appeal).

SECTION II.

Village Community.

The administration of the village was left in the hands of the village community. The local zamindár, the jágirdár, the big farmer, and the headman used to look after the welfare and general affairs of the village. The ruling authority used to appoint *muqaddams, i.e.,* headmen who are popularly known in Bengal as *morals, mondals,* or Mirsáhebs. The *muqaddam* was paid either in cash or a share of the village produce. He was held responsible for crimes in the village under his supervision and required to detect and keep in check offenders. The local zamindár or jágirdár was also held responsible for the outbreak of rebellion, raids, and riots, as well as the preservation of peace and order. The Muqaddam might be removed, or dismissed for his negligence and defection. He was required to act in co-operation with the thánádár and the kotwál. His position seems to have been analogous to that of the President of the Union Board of our times, who acts under the guidance of the district and the subdivisional officers and in co-operation with the local police.

Administration of Justice in Rural Areas.

We have seen that the judicial officers were posted and their tribunals existed in large towns and parganas. But the village community had its own tribunal, *viz.,* the Village Pancháyat to which the villagers ordinarily repaired for settling their disputes and differences.

The Pancháyati system was more in accord with the Indian genius and sentiment than the official tribunals. It was only when they did not like to go to, or lost confidence in, the Village Punch that they repaired to the nearest official tribunal.

In villages the Zamindár's *Kachahri*, or the Jágirdár's *jilawkhána* was the centre of activities. Where the Zamindár, or the Jágirdár had no Kachahri, the *Chabutra* or *Chauk* of the headman of the village was the place of assemblage. Here the villagers used to meet to discuss the affairs of the village community. Here the Pancháyat was held to settle their disputes. Here the caste-court was held to award punishment for defection. But neither the Zamindár, nor the Pancháyat had powers to deal with capital offences, or grave crimes. Such cases were tried by the authorized court of justice.

The policing of the rural areas was in the hand of the Village Community. The work of watch and ward was done through the chowkidárs who were maintained by the community itself. Though the chowkidárs were not directly under any government officer, they were under the supervision of the *Muqaddam* who was held responsible for the rural peace and tranquillity to the local police authorities. During the reign of Sher Sháh the Muqaddam was appointed by the government and paid for his services either in cash or by a share of the produce of land.

The Muslim Government did not break up the solidarity of the Village Community. On the contrary, they encouraged the village pancháyati system and looked upon it with favour. On ceremonial

occasions, the authorities bestowed upon tbe Muqaddam or the headman of the village reward and robe of honour (*Khila't*) for his good services.

" In the old Marathi records we have much information about the Hirdu caste-courts and arbitration Boards which administered justice according to Common law. But they refer to Deccan only, where society was differently constitued from Northern India. A few Sanskrit judgments have survived giving us a glimpse of the Bráhmanic courts sanctioned by the Emperor Akbar, which followed Manu and other text-writers on the ' Gentoo Code,' as Nathaniel B. Halhead called the loose mass of Hindu legal rules and pious injunctions which were appealed to by Hindu litigants at the end of the Mughal period."[1]

[1] Sarkár : " Mughal Administration," p. 110.

SECTION III.

Socialistic Functions.

By the nature of things the administration of a country must be concentrated to the capital, and the government is extended over to the provinces and the subdivisions. In our own times we find that the British administration with all its paraphernalia has been confined to the capital and provincial towns; while the District Officials have their offices and courts in large towns; and their subordinates have their head-quarters in the subdivisions. The Governor's occasional tours are mainly confined to the provincial cities: the district officers go round on inspection to subdivisions, and pay occasional and complimentary visits to the Zamindárs and Táluqdárs in district towns. There are many small towns and villages which have not the honour of receiving the high officials. What the Governor is to the people of the Presidency towns, the Police Superintendent and the *Darogha* are to the villagers.

Almost similar was the case with the Mughal administration. "The Administration was concentrated to the provincial capital. It was city-government, not in the Greek sense of the term, but rather as a government living and working in cities and mainly concerning itself with the inhabitants of the cities and their immediate neighbourhood. The Mughals—after due allowance has been made for their love of hunting and laying pleasure-gardens and their

frequent marches—were essentially an urban people in India, and so were their courtiers, officials and generally speaking, the upper middle classes of the Muhammadan population here. The villages were neglected and despised, and village-life was dreaded by them as a punishment."[1] This account is one-sided and the last portion of the remark is not correct. The villages were hardly neglected and never despised as will presently be seen. If some of the Subahdárs and Foujdárs dreaded the village life, it was due to their temperament or individual eccentricity. The Muslim nobility and gentry, like the ancient Rájás and Zamindárs, were the inhabitants of the country and the majority of them had their permanent residences in rural areas.

In another part of the book the same author says: "The Provincial Government kept touch with the villages by means of (1) the Foujdárs posted to the subdivisions, who almost always lived in the district towns, (2) lower officials of the revenue department, who did the actual collection from the peasantry, (3) the visits of the zamindárs to the Subahdár's court, and (4) the tours of the Subahdár.'"[2]

In connection with this topic the following characteristics should also be noticed:

(1) The village community was not broken up and the village autonomy was left untouched; (2) the Muslim governors and the high officials were Indianized, and have become the permanent inhabitants

[1] Sarkár: "Mughal Administration," p. 55.
[2] *Ibid*, p. 56.

of the country; many of them were the real inhabitants of the rural areas; (3) the Muslim nobility and gentry loved country resorts, and built imposing residential houses, *khánkahs*, mosques and madrasahs; had tanks and wells dug, and *musáfir-khánahs* and guest-houses built in their own and neighbouring villages. So the village life was never disintegrated, and the wealth of the village remained undiverted; (4) the Subahdár, the Foujdár and the Kotwál performed tours and kept close contact with villages; (5) the State-factories (*Kárkhánahs*) drew the skilful artizans, mechanics, goldsmiths, embroiderers, carpenters and various classes of workmen from towns and villages; while the passion of the great nobles for magnificent palaces, pleasure-gardens, terraces, monuments, minárs, fountains, and other works of art, gave a great impetus to the people, far and near, and kept the citizens and the villagers astir; (5) the cost of managing the State-factories and the works of public utility in urban and rural areas, as well as the expenses of constructing roads and rest-houses for travellers, were paid from the State funds; while many works of utility were done by individual magnanimity and munificence; (7) the grants of *Debottar* lands and jágirs for the maintenance of many Temples and Sannyásis, of Khánkahs and dervishes in various towns and villages were the praiseworthy features of the Muslim Rule in India; (8) the country was free from the pernicious effects of capitalism and industrialism, although the State-factories were run by the Government, and the indigenous industries encouraged both by the State and private enterprises; (9) the trade-monopoly and forced

labour were interdicted; and (10) great attention was paid to agriculture as will be seen presently.

Such being the state of affairs in the urban and rural areas, and their interconnection and interdependence, it is unfair to make a sweeping remark that the villages were neglected and despised by the upper and middle classes of Muhammadan population.

Agriculture and Peasantry.

One of the noticeable features of the Muslim Rule is the care and anxiety of the sovereigns for the extension and improvement of cultivation, and their solicitude for the welfare of the peasantry. Sher Sháh took special measures for the improvement of agriculture. The Mughal Emperors followed them up. Every emperor issued special instructions to the provincial authorities directing them to pay attention to the improvement of agriculture and the condition of cultivators. The *Ay-n-i-Akbari*, the Sháhi farmáns and the *Dastur-ul-Amals* contain clear instructions for extension of cultivation, collection of revenue, and help to be given to the peasants. The following extracts from the Farmáns of Aurangzib will throw a flood of light on the subject:

(1) "They (Officers) should practise benevolence to the cultivators, inquire into their condition and exert themselves judiciously and tactfully, so that (the cultivators) may joyfully and heartily try to increase the cultivation, and every arable tract may be brought under tillage."[1]

[1] Farmán to the Diwán of Guzrat, dated 1668, *vide* Sarkár's "Mughal Administration," p. 197.

(2) " Order the *amils* that (*i*) at the beginning of the year they should inquire, village by village, into the number of cultivators and ploughs and the extent of the area (under tillage). (*ii*) If the rayats are in their places, the *amils* should try to make every one of them exert himself, according to his condition, to increase the sowing and to exceed last year's cultivation; and advancing from inferior to superior cereals, to the best of their power leave no arable land waste. (*iii*) If any of the peasants runs away they should ascertain the cause and work very hard to induce him to return to his former places. (*iv*) Similarly, use conciliation and reasonableness in gathering together cultivators from all sides with praiseworthy diligence. (*v*) Devise the means by which barren (*banjar*) lands may be brought under cultivation." [1]

(3) " Encourage the rayats to extend cultivation and carry on agriculture with all their heart. Do not screw everything out of them. Remember that the rayats are permanent (*i.e.*, the only permanent source of income to the State)." [2]

Other Muslim sovereigns also issued similar farmáns for encouraging the peasantry and improving the agricultural production of the country. An elaborate account of this subject does not come within the scope of this book. I therefore refrain from entering into its details.

[1] Farmán to Rasikdás Kroki, *vide ibid*, pp. 216-217.

[2] *Ibid*, p. 61.

CHAPTER VIII

SECTION I.

ADMINISTRATION OF JUSTICE DURING AURANGZIB'S SUCCESSORS.

Historical.

Aurangzib died in 1707. He made a sort of will which was found beneath his pillow on his death. "He there recommends that Moazzam should be recognized as emperor and that he and Azam should divide the empire; one taking the northern and eastern provinces with Dehli for his capital and the other Agra with all the countries to the south and south-west of it, including all the Deckan, except the Kingdom of Golcunda and Bijapur. These last were assigned to Cambakhsh."[1]

This will was not respected. There was a contest for the crown between the brothers. Moazzam was victorious and ascended the throne under the title of Sháh 'Álam I. He is also called Bahadur Sháh. Then followed several emperors more titular than real but none of them was powerful enough to save the empire from disruption.

Causes of deterioration.

Within half a century from the death of Aurangzib to the grant of the Diwáni to the East India Company in 1765 A. D. the splendid edifice of the Empire gradually crumbled down. India became a

[1] Elphinstone: "History of India," p. 655.

theatre of warfare. Internally she was torn asunder by the Maharattas, the Sikhs, the Rohillas and the provincial Viceroys some of whom assumed independence. Externally, the country was exposed to invasions. Then appeared the French and the English on the scene and played their parts. This period witnessed the startling vicissitudes which swept away the old order of things and laid the foundation for the future of India.

The history of this period does not give a detailed account of the judicial administration. The chroniclers appear to have been more busy with recording the fleeting events and various catastrophies that befell the empire. Yet we may glean from their writings the state of affairs relating to the administration of the country.

Condition of the capital.

The Central Government became distracted and weak. Naturally the administration, both on the executive and judicial side, was disturbed and disorganized. Yet its general character remained the same. For some time the existing State-machinery continued and the pre-existing tribunals performed their usual functions ; but the quality of justice and the prestige of the judiciary suffered owing to the lack of State-control, and want of recruitment of the best men for the judicial post. On many an occasion the courts remained closed owing to the disturbed condition in the capital. The lower elements got the upper hand. Amidst the disruptive forces the emperors had little leisure to hold court and exercise proper control. Consequently, the judicial and

executive officials became lax in the discharge of their duties. Then came the crash—the invasions of Nádir Sháh and Ahmad Sháh Durráni, which disorganized the whole administrative machinery.

In some of the provinces which declared independence, or where the government was somewhat stronger, the matter was not so bad. There the administration of the province was kept a-going as usual. The tribunals which were in existence during the time of the Great Mughals, smoothly performed their usual functions. The Subahdár or the independent Názim of the province kept control over its administration. Though its general features remained almost the same, the administrative system underwent certain modifications. These were necessitated by the exigency of the time. Inspite of the attempts at improvement, the administration of the country suffered. Owing to the disturbances to which the country was frequently exposed, the high State-officials were obliged to pay more attention to military operations than to the administrative works. These works practically passed into the hands of the Náib Názim, the Diwán, the Foujdár and the Qázi who looked to the affairs of the provinces. Such was especially the case with Bengal and Oudh as will presently be seen.

Condition of Provinces.

SECTION II.

Judicial Machinery of the Period.

In the previous chapters I have pointed out that under the Islámic Government Justice was administered by two distinct classes of tribunals, *viz.*, the court of Canon Law, and the court of Common Law (*vide* Chapter II, p. 25). Mr. Field supports the view when he says:

" In the provinces or Subahs, the same two classes of tribunals existed. When the Qáẓi was a man of celebrity and individual importance, his power and influence upon the distribution of justice were great in proportion, but it commonly happened that the Governors and their officers assumed the disposal of all the more important cases, while the Qáẓi became merely an officer for registering deeds and performing marriages. The following are the judicial authorities which we found in existence at Murshidabad immediately after the grant of the *Diwáni*:

I. *The Názim,* who was Supreme Magistrate, presided personally the trial of capital offenders.

II. *The Diwán*, who was supposed to decide cases relating to real estate or property in land, but who seldom exercised this jurisdiction in person.

III. *The Darogah-Adálat-al-'Alia* or Deputy of the Názim in the Criminal Court, who took

cognizance of quarrels, frays and abuse and also of all matters of property excepting claims of land and inheritance.

IV. *The Darogha-i-'Adalat-i-Diwáni* or Deputy of the Diwán in the Civil Court.

V. *The Foujdár* or Officer of Police and Judge of all crimes not capital.

VI. *The Qáẓi* who decided claims of inheritance or succession.

VII. *The Muhtasib* who had cognizance of drunkenness, the vending of spirituous liquors and intoxicating drugs and the examination of false weights and measures.

VIII. *The Mufti*, who expounded law for the Qáẓi, who if agreed decided accordingly. If he disagreed, a reference was made to the Nizám, who called a Council of the jurisconsults.

IX. *The Qanungos* or the Registrars of lands to whom cases connected with land were occasionally referred for decisions.

X. *The Kotwál*, or the Peace-Officer of the night, subordinate to the *Foujdár*." [1]

Such was the judicial machinery in Bengal at the break-up of the Mughal Empire. Compare with it the four tables in which the different grades of tribunals have been mentioned.

In the enumeration of judicial tribunals Mr. Field does not mention the civil judges called the Sadr and

[1] Field : "Introduction to the Regulation of the Bengal Code," pp. 169-170.

the 'Adl, nor does he say whether there was any Chief Qáẓi. But he mentions the name of the two courts (III and IV) which did not exist in the capital during the reign of the Great Mughals. Probably some courts under different designations existed in Bengal as well as in other provinces. However, Mr. Field's enumeration of tribunals throws a flood of light on the existence of the courts of different gradation as stated in the tables.

When the servants of the East India Company took the charge of the administration of the country, they found it in a chaotic condition. Mr. Field's observation on the administration of justice during the period of transition is worth quoting. He says:

"The operation of these Courts was confined to the circle round about Murshidabad, and there were no proper arrangements for subordinate jurisdiction in the distant districts. The Qáẓi indeed had his substitutes, but their power was exercised under no lawful and authoritative commission, and depended upon the pleasure of the people, or their ability to contest its exercise. The Zamindars, farmers, and other revenue officers accordingly assumed that power for which no provision was made by the laws of the land, and they exercised it with a view, not to justice but their own interest."[1]

"Seven years after the acquisition of the Diwani, the Company's Government took the first step towards improving the administration of justice. Under the Regulations of the 15th August, 1772, two courts, a

[1] Filed: "Introduction to the Regulations of the Bengal Code," p. 170.

Diwáni or Civil Court, and *Foujdari* or Criminal Court, were instituted for each provincial division or Collectorship as then constituted." [1] For some time the Muhammadan law was administered with some modifications. "The Qázi and Mufti of the district and two Moulvis sat in the *Foujdári Adálat* or Criminal Court to expound the Muhammadan Law and determine how far accused persons were guilty of its violation, but it was made the Collector's duty to see that the proceedings were regular and the decision fair and impartial." [2]

It is not within the scope of this thesis to trace the gradual changes introduced into the judicial system. Suffice it to say that the Islámic civil law was (with the exception of personal law) easily superseded, but the penal law was continued to be administered in the criminal courts of the time. Gradually even that law was superseded. Sir Roland Wilson says: "The system was gradually Anglicised by successive Regulations, the Muhammadan elements did not entirely disappear till 1862 when the Penal Code and the first Code of Criminal Procedure came into force, nor as regards the rules of evidence till the passing of the Indian Evidence Act in 1872." [3]

[1] Field: "Introduction to the Regulations of the Bengal Code," p. 171.

[2] *Ibid*, p. 171.

[3] Anglo-Muhammadan Law, p. 30.

SECTION III.

A Comparative View of the Islámic Courts and the British Courts of Justice.

In previous chapters, we have seen that different grades of court existed in India during the Muslim Rule. We have further seen how the judiciaries who presided over those courts exercised their jurisdiction over original suits and appeals. Now let us see how far they bear resemblance to the British courts of justice.

I. The Royal Court (Diwán-i-Sháhi) resembles the Privy Council with some distinctions, *viz.*,—

(*a*) In the case of the former the Sultán or the Emperor used to hear and decide cases personally, whereas the King-Emperor does not preside over the Privy Council, but judgments and orders are passed in his name.

(*b*) The Privy Council decision is fictitiously regarded as the King's decision, but the Muslim Emperor's decision was the real decision of the sovereign.

(*c*) The Court of the Muslim Monarch had both original and appellate jurisdiction; while the Privy Council exercises appellate jurisdiction only.

(*d*) The Judicial Committee of the Privy Council is presided over by several judges, while the Royal Court was presided over by the sovereign, and his decision was given in

consultation with the law-officers of the Crown, the high State-officials, and the learned in law.[1]

II. The Mir-i-'Adl, The High Diwán, The Provincial Diwán.—These judicial officers resemble the Judges of the High Court and of the district courts in the following respects :

(*a*) They had the original and appellate jurisdiction, as the High Court (Original Side) and the District Judges have.

(*b*) They had the power of supervision over the subordinate courts as the High Court and the District Judges have the power of superintendence over the lower courts under their respective jurisdiction.

III. The Qáẓi-ul-Quẓát resembles the Chief Presidency and the District Magistrates with this difference: (*a*) the Chief Presidency Magistrate has no civil nor appellate jurisdiction, whereas the Chief Qáẓi had the power of hearing appeals, both criminal and civil, arising out of a certain class of civil suits, *e.g.*, succession, marriage, etc.; (*b*) the District Magistrate has no jurisdiction over cases of a civil nature, but like the Chief Qáẓi he can hear criminal appeals. The Chief Qáẓi also resembles the Sessions Judge to some extent, *viz.*, in his power of hearing criminal appeal and holding sessions trial

[1] *Vide* description of the Royal Court in pp. 39-40 *ante*.

(*i.e.*, exercising original criminal jurisdiction).

IV. The Diwán, the Sadr, the 'Adl and some of the Qázis when vested with power on that behalf, exercised authority over the Mál 'Adálat or Revenue courts just as the District and the Subordinate Magistrates do in the "capacity of collectors, or deputy collectors or assistant collectors."[1]

V. The Sadr-i-Jahán and the Sadr had among other functions the charge of distributing pensions and allowances to the princes and the State prisoners. To this extent, they resemble the officers in charge of the Political Pension in their capacity of the Political Agent.

VI. The Diwán-i-'Alá or the High Chancellor of the Excheq uer resembled the Lord Chancellor of the modern time with this difference that the High Diwán was the Lord Chief Justice who used to preside over the Chief Appellate Court.

VII. The Subahdár occupied the position of the governor of a province with certain distinctions: (*a*) he was the Commander-in-Chief of the provincial army (Sipáhsálár) whereas the Governor is a civil officer only ; (*b*) the Subáhdár used to preside over the chief criminal court of the Province ; the provincial Governor does not hold any court.

1 **Field : " Introduction to the Code of Bengal Regulations," p. 228.**

VIII. The provincial Diwán resembled the Member of the Board of Revenue with these distinctions: (*a*) he used to preside over the chief court of civil appeals as well as over the Revenue Court (Mál 'Adálat) ; (*b*) he exercised supervision over the civil courts of the province, whereas the Member of the Board of Revenue has no such jurisdiction.

IX. The Foujdár of the district town or of the Parganah resembles the Sub-divisional Magistrate. In addition to his military duty the Foujdár had jurisdiction over criminal matters and helped the Revenue-authorities in collecting revenues. To this extent, he was like the Sub-divisional Magistrate in charge of the Treasury in the capacity of the Collector. But the Revenue Department was under the control of the Diwán.

X. The Kotwál of the city, or of a district town, or of a parganah resembles the Commissioner of Police of the Presidency town, or the Superintendent of Police of a district. The Kotwál investigated the cases of offence and sent up the offenders for trial, just as the police officers do in our time. The former was responsible for peace and tranquillity like the latter.

XI. The Muhtasib or the Public Censor combined in his person the functions of the Police and the Excise Officers, as well as of the Municipal supervisor of our times. Just as the police regulates traffic, controls grogshops

and brothels, raids gambling dens, keeps watch over immoral traffic, and public decency, etc., and just as the Excise Officer detects and controls the secret sale and preparation of fermented liquors and intoxicacating drugs, and just as the Municipal officer detects the sale of adulterated articles of foodstuff, and regulates the construction of buildings, privies, markets, etc., so the Muhtasib exercised his authority over all these matters.[1]

[1] Prof. Sarkár in his "Mughal Administration" (page 30) has made some sarcastic remarks and serious allegations against the Muhtasib without adducing any proof. He says: "He used to go through the streets with a party of soldiers demolishing and plundering liquor-shops, distilleries and gambling dens wherever he found them breaking with blows the pots and pans for preparing bhang and enforcing the strict observance of religious rites on the part of the Muhammadan population." The charges are too general and too sweeping; and his sarcastic remarks are below the dignity of an author. Does Mr. Sarkár ask us to believe that in the heart of the imperial cities during the erign of the Great Mughals, the Muhtasib was allowed to commit acts of vendetta without let or hindrance? Does he know of the raids by the police and excise officers of his own time into opium and gambling dens and the suspected haunts of illicit preparation and sale of excisable articles? Does he not consider such raids as part of their duty? But even conceding for the sake of argument that some Muhtasib like some over-zealous police officer, committed excesses, Mr. Sarkár is not justified in levelling sweeping charges against the personnel of al-Hisbah as a class. This is not the only remark that he has made. His book is interspersed with taunts and ridicule against almost all the Mughal officials and his tone and mode of expression are highly objectionable and betray an unfortunate communal bias. Further, they detract a good deal from the merits of his work.

SECTION IV.

INFLUENCE OF THE MUGHAL RULE ON THE PRESENT SYSTEM OF ADMINISTRATION.

The student of history cannot fail to discover the strong influence of the Mughal Rule on the present system of the British administration of India. On the fiscal side, the clear traces of the Muslim rule are visible in the system of land revenue and in the nomenclature of the Revenue Department, such as, *Amin*, *Kánungo*, *Paimásh*, *Khazánchi*, *Khazána*, *Tacavi*, *Chungi* (*Octroi*), *Málkhána*, etc. But it is the Judicial Department where we find the full influence of the Mughal system of administration. Almost all the terms concerning the court nomenclature[1] are the same as those of the Mughal period. Although the District Judge is not now called Qáẓi, it is held by the judicial decisions that he is the inheritor of the powers of the Qáẓi. There is a certain class of cases, such as waqf, dissolution of marriage, etc., which the judge can try only when vested with such powers or specially authorized by the government on that behalf. In the case of *Atimunnessa* versus *Abdul Sovan*, the learned Judges observed: "a subordinate Judge who has not been expressly authorized by the government to exercise functions in connection with the

[1] Such as Munsif, Sadar'alá, Serishtadár, Peshkár, Darkhást, Multavi, Vakil, Arzi, Jawáb, Sawál, Izhár, Jirah, Ishtahár, Nilám, Ruydád, Misil, Maqaddama, Sáni, Sális, 'Adálat, Diwáni, Foujdári, Hukûm, Hákim, etc., etc.

administration of wakfs is not competent to act in that behalf. In respect of wakfs which may be described as trusts for public purposes of a religious nature within the meaning of sub-section (1) of Sec. 92 C.P.C., the District Judge may be assumed to have been authorized to discharge the functions of a 'Quadi.'" In that very case, Mukherjee, J., gave the following directions—"With regard to private wakfs it is desirable to cover such cases the local government should authorize either the District Judges or Subordinate Judges or even Judicial Officers of a lower grade, if it be thought desirable, to exercise the functions of a quadi." [1] In some earlier cases it was presumed that the Civil Court of superior jurisdiction is vested with the powers exercised by the Qáẓi under the Muhammadan regime.[2]

Not only this. When the Supreme Court was established, it was vested with the rights and powers possessed by the *Sadr-Diwáni 'Adálat.* When the High Court of Judicature was established, it is settled by the judicial decision that the High Court has become the inheritor of the *Sadr Diwáni 'Adálat.* On the face of several Enactments and Regulations which recognize the transmission of certain rights and powers possessed by the courts of justice during the Muslim rule, we need hardly go to the musty records of the past to find out the traces of the Mughal administration of justice.

1 20 C. W. N. 113; also *vide* Fakrunnessa Begum *versus* the District Judge of 24-Parganas, 24 C. W. N. 339.

2 Shyamacharan *versus* Abdul Kabeer, 3 C. W. N. 158. *In the matter of* Woozatunnessa Bibee, 36 Cal. 21.

Further, the legal vocabulary and the glossary of law terms daily remind us of the influences of the Muslim system of judicial administration. The annual *Darbárs* held by the British officials for conferring *Khitáb*, *Khilat* and *Sanad* in *Kharita*: and especially the grand *Darbár* held at Dehli at the Coronation of His Majesty the King-Emperor when Lord Curzon tried to surpass the great Mughals in pomp and pageantry, bring to our mind the mighty influence of the Muslim sovereignty on the British administration.

In pointing out the traces of the Mughal rule, the author of the "Mughal Administration," says: "The administrative system of the Mughal Empire has more than an academic interest for us. This type of administration, with its arrangement, procedure, machinery and even titles was borrowed by the Hindu States outside the territories directly subject to Mughal rule. It would not be a surprise to see the Mughal system copied by the Vassal Rajas of Jaipur or Bundelkhund, just as in our own day the British system is faithfully copied by the darbars of Baroda and Gwalior, Indore and Alwar. But the Mughal system was also the model followed by some independent Hindu States of the time. Even a staunch champion of Hindu orthodoxy like Shivaji at first copied it in Maharastra, and it was only later in life that he made a deliberate attempt to give a Hindu colour to his administrative machinery by substituting Sanskrit titles for Persian ones at his court, but most of the names of departments, records and subordinate officials in his kingdom remained Islamic where they were not indigenous Marathi.

"Thus the Mughal system at one time spread over practically all the civilized and organized parts of India."

"Nor is it altogether dead in our own times. Traces of it still survive, and an observant student of history can detect the Mughal substructure under the modern British-Indian administrative edifice. When in the late 18th century a band of English merchants and clerks were unexpectedly called upon to govern a strange land and an alien race, they very naturally took over the Mughal system then prevailing among the people, made in it only the most necessary changes, and while retaining its old framework they very reluctantly and slowly added such new elements as the safety and prosperity of the country demanded from time to time. This was the true character of the Anglo-Indian administration of Bengal and Bihar under Warren Hastings Under his successors, after many intervals of repose, the administration has again and again departed from its Mughal original. But the new has been built upon the old, our present has its roots in our past"[1]

[1] Sarkár: "Mughal Administration," pp. 2-4.

CHAPTER IX

SECTION I.

Adjective Law and Applicability.

" When you decide between people, give your decision with justice."
—*Qurán.*

In order to understand the scheme of administration of justice during the Muslim sovereignty in India, it will be interesting to know certain aspects of the Adjective Law of Islám. A detailed statement of the Substantive Law does not properly come within the scope of this thesis. Various treatises in English on the Muhammadan law have dealt with this branch of law so far as it is applicable to the British Court of Justice. But none of them have touched the Adjective Law. I have, therefore, tried to deal with those aspects of the adjective law which regulate and control the judicial machinery. Without some knowledge of this branch of law, it is hardly possible to form an idea as to what sort of procedure the Qáẓi used to follow in the court.

In this respect the Rules of Procedure and Law of Evidence are most important. But to wade through the mazes of rules and technicalities is a tedious task. I have, therefore, avoided them as far as possible, and stated in a succinct manner those rules of procedure which throw light on the mode of trial in the court of Qázis.

Rule of Procedure during the Islámic Commonwealth.

Specimen of the earliest Rules.

At the very beginning of the Islámic Commonwealth when there were no treatises on the Muslim Law and Jurisprudence, the second Caliph (Hazrat 'Umar) issued a *farmán* to Abu Musa Ashari, the Governor of Kufa, for the guidance of the court. The rules of procedure contained in the *farmán* furnished the Muslim jurists of the subsequent age, with the basis on which the adjective law has been founded. The *farmán* contains the following rules:

" (1) The administration of justice is essential: treat all men justly and on equal footing when they appear before you in your court so that the weak may not be disappointed from justice and the well-to-do may not hope to get any advantage from you.

(2) The burden of proof is on the person who puts forward a claim and oath on the person who denies it.

(3) Compromise is allowable provided it does not make a lawful thing illegal, and the illegal thing lawful.

(4) A decision passed yesterday regarding a dispute may be revised on the next day so that you may arrive at a correct decision.

(5) If there be any doubt on a point and no text or tradition is available, then ponder over it and again ponder over it and try to find out precedents, then try to solve it by ratiocination.

(6) When a party desires to produce evidence, fix a date of hearing.

(7) If he adduces proof, adjudge his rights in his favour; otherwise dismiss his claim.

(8) All Muslims are competent witnesses amongst themselves except those who have suffered the punishment of *Hadd* [1] or have been characterized as liars by the court, or whose clientage is doubtful.'' [2]

It should be borne in mind that these rules have undergone great changes through the process of development. Now, we find that strict rules have been laid down to check the judicial vagaries and the temper of the presiding officers, to regulate the proceedings of the court, to test the veracity of witnesses by cross-examination, to prepare regular records and decrees called *Muházir* and *Sijilát* in proper forms.[3] If proper records of proceedings and decrees are not prepared in conformity to the prescribed rules, they will be set aside.[4]

[1] *Hadd*, a specific punishment for certain crimes.

[2] Shibli: "Al-Fáruq," Part II, pp. 49-50, where the *farmán* is quoted.

[3] Baillie, "Digest of Muhammadan Law," p. 763.

[4] *Ibid*, p. 764.

SECTION II.

Procedure and Pleadings.

"The most noteworthy feature of this part of the system lies in the elaborate rules which have been laid down for the purpose of guiding the court in determining the general credibility of a witness and the truth of his statements in order to guard against the possibility of the court being misled by his testimony...In cases where the parties have made contradictory allegations, rules are laid down as to whose evidence is to be preferred."[1]

As already stated it is hardly possible to give all the details of the law of procedure and evidence within the short compass of this thesis. I shall, therefore, note below the salient features of this branch of law.

Proper Forum.

Proper Forum.

It is necessary first of all to select a proper court. The claim of the plaintiff is to be decided by the court which has jurisdiction to entertain it. The jurisdiction of the court is determined by the powers of the Qáẓi contained in his letter of appointment. His powers may be restricted to the trial of a particular class of cases, or to a particular area.[2] (*Vide* Chapter XII.)

A. Rahim : "Muhammadan Jurisprudence," p. 364.
Fut. Alam, Vol. IV, p. 1.

The residence of the plaintiff and his witnesses is also a factor in determining the jurisdiction of the court. The suit lies in the court within the jurisdiction of which they reside, even if the defendant resides in, or the subject-matter of the suit is situated within the jurisdiction of another Qáẓi. Here preference is given to the plaintiff's place of residence as the plaintiff is the aggrieved party.

Jurisdiction.

If the action is instituted in a wrong court, his claim will not be heard.

The claim is called *Dáwa*. When a person demands a thing and it is disputed by another, it is *dáwa*.

Claim.

The person who puts forward a claim is called *mudda'i*, *i.e.*, claimant or plaintiff; and the person who denies or disputes the claim is called *Mudda-'alaih* or defendant.[1]

Kudurce points out the distinction between the plaintiff and the defendant thus: The plaintiff is "one who cannot be forced to litigate if he refuses;" and the defendant is "one who can be forced to litigate though he refuses." According to another definition the *Mudda'i* is "one who has no right without proof" (*hujjat*), and the *Mudda-'alaih* is "one who is entitled on his own assertion without proof as a person in possession."

When two or more persons are concerned in violating or interested in denying the right of the claimant the general

Parties.

[1] *Ináyah*, Vol. III, p. 519.

rule is:

(1) With respect to a specific thing, the person in possession of such a thing is to be made defendant ; *e. g.*, "if a person has taken wrongful possession of a horse belonging to another and sold it to a third person, the owner of the horse must sue the person who has possession of the animal." The person who suffers loss is entitled to sue the vendor for recovery of the price he has paid.[1]

(2) A person having possession of a movable or immovable property may sue the person who has taken wrongful possession of the same without making the owner a party.

(3) One of the heirs of a deceased person "may be a plaintiff or defendant with respect to a claim which could have been made by or against the deceased." [2]

(4) If a person has a claim for money against the estate of the deceased he is entitled to establish his claim in the presence of one of the heirs whether he is in possession of any portion of the estate or not. But the admission of one of the heirs will not be binding upon the others.

(5) "When there are several sharers in specific property but not by right of inheritance, one of the co-sharers cannot represent the others as defendant in a suit with respect to such

1 A. Rahim : "Muhammadan Jurisprudence," p. 367.
2 *Ibid*, p. 368.

property, but if he is sued alone, a decree will be made against him to the extent of his share."[1]

(6) One member of the public may sue to establish a right in which the public are generally interested ; and a decree in his favour will be for the benefit of the public, *e.g.*, right in a public pathway or a public road.

(7) In a suit for declaration of right in respect of a common or waterway or stream in which two or more villagers are interested, if the number of inhabitants be indeterminate, some inhabitants of each village may join in suit ; if the number is limited,[2] all of them should be made parties.[3]

Plaint and its Content.

The plaintiff may state his claim in writing or make oral statement in respect of his claim. If orally made an assistant of the court is required to reduce his statement into writing. The memorandum of the claim, must contain (*a*) the name of the parties, their parentage and address, (*b*) the same particulars regarding witnesses ; (*c*) sufficient particulars of the claim ; if it is for movable articles, the claim must specify the value, " quality, genus and quantity of the commodity; " if it is immovable, " its four boundaries," the place where it is situated, the name of its owner and

[1] A Rahim : "Muhammadan Jurisprudence," p. 368.

[2] *Ibid*, p. 369.

[3] On the topic of joining parties *vide Al-Majallah*, pp. 277-78.

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of the person who has its possession; (*d*) the nature of the claim and the relief prayed for, as well as "some cause of liability must also be assigned," [1] *i.e.*, cause of action.

Commencement of Hearing.

There are some special features of the law of procedure in connection with the trial and hearing of a suit in the court. They may be noticed as under:

Judgment in presence of parties or their representatives.

(1) Muhammadan law does not favour the trial of a claim in absence of the defendant or the opposite party.

(2) As far as possible hearing should be in the presence of the parties or their representatives.

(3) If the defendant is not available, the court may proceed *ex-parte*, but it shall have to appoint a representative for watching the interest of the defendant and the proceedings of the court.

***Ex-parte* decree.**

It should be noted that according to the Sháfy'i law, decree may be passed *ex-parte* [2]; but according to the Hanafi law "the Qázi must not pass a decree against an absentee unless in the presence of his representative." [3]

[1] Fatáwa-i-Alamgiri, Vol. IV, Chapter on "Claim."
[2] Manháj-ul-Tálibin, p. 507.
[3] Hidáya (Grady), p. 342.

(4) When *ex-parte* decree has been passed against a defendant, and he afterwards appears and challenges the correctness of the decree, his objection will be heard and he will be allowed to meet the claim of the plaintiff.

(5) If on the service of the summons, the defendant does not appear or refuses to appoint a representative, the court will enforce his attendance. But, "if his presence cannot be secured, then a copy of the plaint is to be sent *thrice* to him at different times, and if he still does not come it is to be notified to him that an agent will be appointed on his behalf by the court and the claim and evidence will be heard."[1]

(6) In default of his appearance on such notice the court will appoint a representative on his behalf and decide the case on evidence.

Pleadings.

Denial of claim or Reply by way of avoidance.

When the plaintiff has stated his case, the court will call upon the defendant to meet the claim. He may do it either by way of denial, or by way of avoidance (*dafá*).

If the defendant denies, the plaintiff will be required to prove his claim. But the defendant may not deny the claim yet he may dispute it by putting

[1] A. Rahim: "Muhammadan Jurisprudence," p. 369.

forward his own case. For instance, if the plaintiff sues for the recovery of an amount of debt, the defendant may dispute the claim by saying that there was the debt due from him, but he has paid it, or that the plaintiff has released him from the liability. This is what is called "reply by way of avoidance." In such a case the defendant will be called upon to prove his allegations.

As to Law of Evidence, *vide* next section.

Practice and Procedure of the court.

From the treatises on *Adáb-ul-Qázi*, *i.e.* practice and procedure to be observed by the court, the following summary is taken:

"The trial should be held in an open court. The Qáẓi is required to sit in the court of justice (*dárul-Qazá*). The peons and orderlies must be present at a distance in the court. The public as well as the parties and their witnesses are allowed to have a free access to the court. The peons are to regulate the crowd and keep order in the court. The Kátib, the writer or the clerk of the court, is to sit near the Qáẓi. His duty is to receive plaints and petitions and to record evidence under the direction of the court. The Qáẓi sits on the *masnad*, sometimes on a raised platform covered with carpet. The parties are to sit in front of the Qáẓi and must be treated on equal footing whatever may be their respective position. The Mufti and Ulamá (the law-officers of the court) are to take their seats near the Qáẓi. The usher calls in the parties. The Vakil represents the parties or the parties themselves state their case. No oath is to be administered in the first instance, because 'evidence

is incumbent on the part of the plaintiff and oath on the defendant.'[1] The Kátib records the statements and evidence. But it is held better that the Qáẓi should himself take down the evidence. After hearing the plaintiff and his witnesses, if the Qáẓi thinks that a *primá facie* case has been established, and that the statements of the witnesses are in conformity with the allegations in the plaint, he will call upon the defendant for an answer. This can be done either by way of denial, or by a reply by way of avoidance. If the parties desire to examine witnesses and ask for time, the Qáẓi must grant time and adjourn the hearing. Otherwise he is to adjudge the case on materials before him. The order of the court is to be noted in the register of the case.

The judgment and decree are to be drawn up and *Mahzur* and *Sijil* (decree and records of proceedings) are to be prepared in accordance with certain rules and embodied in the prescribed forms."[2]

Hidáya (Grady), p. 451.

[2] Baillie : " Digest of Muhammadan Law," pp. 763-69.

SECTION III.

Law of Evidence.

"O you who believe, be maintainer of justice when you bear witness for God's sake although it be against yourselves, or your parents, or your near relations, whether the party be rich or poor, for God is most competent to deal with them both; therefore do not follow your low desires in bearing testimony so that you may swerve from justice, and if you swerve or turn aside then surely God is aware of what you do." —*Qurán* 4 : 135.

"O true believers, observe justice when you appear as witnesses before God, and let not hatred towards any induce you to do wrong, but act justly."—*Qurán* 5.

According to the opinion of the Muslim jurist testimony of witness (*shahádat*) is a juristic act which is regarded in the nature of information. When a witness speaks to a certain state of fact which affects the right of a person, the state representing the community takes notice of it when brought to its knowledge through any official of the state. Thus in giving effect to the testimony, the official (*i.e.*, Qáẓi) has to depend upon the information supplied by the witness. Such information may be true or false, which determines the character of the evidence.

"False testimony is not regarded as evidence by the Muhammadan jurists, as the very object of information is to disclose what occurred. In fact according

to them false testimony, or false evidence, or false information would be a contradiction in terms."[1]

The same author says: "The right of the witness, however, is to give true evidence (*shahádat*), but as men do not always give correct information either from error of perception, or some moral aberration it is incumbent upon the law to take precaution with a view to prevent the court as far as possible from being misled by falsehood."[2]

The Muslim jurists have laid down innumerable rules of evidence with nice reasonings which sometimes descend to mere subtleties of the casuist. If fully stated, they will appear tiresome. I have, therefore, left them out and state here certain broad principles relating to the Law of Evidence according to the opinion of Abu Hanifa:

(1) Testimony of an eye-witness is preferable to hearsay evidence.[3]

(2) Hearsay evidence should be direct, *i.e*, the evidence of the person who heard the words spoken on the occasion regarding which the witness is deposing.

(3) Indirect evidence is admissible in establishing facts in certain cases, *viz.*, legitimacy, marriage, paternity, death, etc.[4]

[1] A. Rahim: "Muhammadan Jurisprudence," p. 375; *vide* also *Fath-ul-Qadir*, Vol. VI, p. 446.

[2] A. Rahim: "Muhammadan Jurisprudence," pp. 375-76.

[3] Sharh-i-Vaqáya, Vol. III, Chapter on *Shahádat.*

[4] "Hidáyah," Vol. VI, pp. 466-7.

(4) A fact which has got public notoriety regarding the state of a certain thing, its existence, use, etc., is admissible,[1] *e.g.*, the existence of an endowed property (waqf) and its use, whether a building is a public mosque and so forth.

(5) Those facts or occurrences which militate against or appear impossible to rational intelligence (*aql-qatay'i*) are not worthy of reliance.[2]

(6) Those facts and occurrences which are contrary to ordinary human experience or natural course of events are not worthy of credence.[3]

(7) Those facts which stand in direct conflict with clear reasonings or ratiocination (*Qiás-i-jali*) are not to be accepted.[4]

(8) Opinions of experts and the persons especially versed in some particular branch of science (*máhirin-i-fan*) such as physiognomy is admissible in evidence.[5]

(9) Decision may be given on admission (*iqrár*) provided it is unconditional and not made in jest or under coercion. When a person makes a statement against his own interest and it supports the claim made against

[1] *Ibid*, p. 469.
[2] Shibli : "Sirat-un-Nûmán," Part II, p. 152.
[3] *Ibid*, p. 153.
[4] *Ibid*, p. 154.
[5] *Al-Qaza fil Islám*, pp. 54-55.

him, such admission or statement will not be binding upon others.[1]

(10) A witness may retract his statement or evidence; but such retraction must be made in court before the order is passed. If retraction is properly made, his evidence will be rejected; if not made in court, no notice will be taken of the retraction.[2]

Muslim jurists divide testimony under three heads: (1) *tawátir*, notorious or universal, *i.e.*, evidence of facts having public notoriety; (2) *ahad* or isolated, *i.e.*, evidence of isolated persons not having universal character; and (3) *iqrár* or admission.

Corroboration.

The Muhammadan jurist insists on corroboration of evidence. The general rule is that there should be more than one witness, at least two men, or one man and two women.

In criminal cases the evidence of two men, but in whoredom, of four men, is necessary. But the court may accept the evidence of one witness provided it is convincing and unreproachable.[3]

Woman with special knowledge.

In certain cases which are within the special province of woman, the evidence of one woman is deemed sufficient, *e. g.*, proof as to virginity or child-birth. But according to Imám Shafy'i the evidence of four women is required in such cases.

The testimony of a person in favour of his own son,

[1] A. Rahim : "Muhammadan Jurisprudence," p. 381.

[2] *Ibid.*

[3] *Al-Fárûq-ul-Hûkûmia*, p. 48.

grandson, father, grandfather, or of the wife in favour of her husband, of a master in favour of his slave, or of a partner in favour of another partner, is not admissible.

Persons incompetent to be witness.

Certain classes of men, such as professional singers and mourners, drunkards, gamblers, falconers, habitual liars, atrocious criminals, as well as men of immature understanding, such as an infant, an idiot, or a blind person in matters to be proved by occular testimony, are regarded unfit for giving evidence.

Examination and Cross-examination.

Izhár and *Jirah* are the two terms for examination-in-chief and cross-examination. The rule is that each witness should be kept separate, and then examined and cross-examined separately so that " one may not hear the narration of the other." This method was first adopted by the fourth Caliph (Hazrat Ali).[1] Since then the jurists have laid down rules for conducting examination and cross-examination. Leading questions are not allowed to avoid the implication that the court is trying to help one party to the prejudice of the other by putting questions and getting answers of the facts which should be proved by the witness. But if a witness is frightened or gets confused, the Qáẓi may put such questions as to remove his confusion, though they may be leading,[2] but not in such a manner as to make him liable to the charge of partiality.[3]

When the deposition of a witness has been recorded it is the duty of the Qáẓi (*wajib*) to read over the evidence to the witness and put his seal on it. Imám

[1] *Al-Fárûq-ul-Hûkûmia*, p. 48.
Hidáyah, Vol. III, chapter on "Adáb-ul-Qázi."
Sharh-i-Vaqáya, Vol. III, Book of Justice.

Yusuf does not make this procedure a condition, but holds it sufficient that the witness should be apprised that the record (*kitab*) and the seal are of the court. Imám Sarakhsi agrees with him. But the author of *Sharh-i-Vaqáya* does not accept the view of Abu Yusuf.[1] This procedure is to be observed when the record of evidence taken down by one Qázi is to be sent to another Qázi for action.

Documents and books of account.

Documents executed in presence of two witnesses, official records, and records of a court of justice, as well as books of accounts kept in course of business, may be accepted in evidence.[2] Mere production of documents is not held sufficient. They must be proved by evidence.

Circumstantial evidence and inference.

Circumstantial evidence is admissible. An inference (*qarina*) is allowed to be drawn from the circumstantial evidence, if the facts and circumstances lead to the proof of a conclusive nature. " Besides human testimony, facts and circumstances (*qarinat*) may also be relied upon as a proof. But the circumstantial evidence will only be acted upon if it is of a conclusive nature (*qatiatun*). For instance, if a person is seen coming out from an unoccupied house in fear and anxiety with a knife covered with blood in his hand, and in the house a dead body is found with its throat cut, these facts will be regarded as a proof that the person who was seen coming out murdered him.[3]

1 *Sharh-i-Vaqáya*, Vol. III, Sec. Record of one Qāẓi to another.

2 *Fatáwa-i-Alamgiri*, Vol. III, p. 534 .

3 A. Rahim " Muhammadan Jurisprudence," pp. 381-2.—*Al Qaza fil Islam*, pp. 75-76

SECTION IV.

Estoppel.

In Muhammadan Law there is a sort of Estoppel which arises from the previous conduct of a party. It is called *Bayán-ud-ḍarurata*. A person is allowed to raise the plea of estoppel if he can establish that the conduct of his adversary is such as to debar him from giving evidence of a certain fact. For instance, if the owner of a horse sees another person selling the animal and he keeps quiet and allows the man to dispose it off, the owner will not be allowed afterwards to prove that the man who sold the horse was not authorized by him to sell the horse.

Res Judicata.

Under Muhammadan Law there is a rule similar to that of *res judicata*. "The same cause cannot be tried over again. A previous decree of the Qáẓi is conclusive and final. It can be tendered as evidence in the court of law."

Law of Limitation.

The old idea.

In the opinion of the old jurists (*Fuqahá*) the claim of a person should not be allowed to be lost on account of lapse of time. Whatever may be the duration of time that

[1] Dr. Muhammadullah: "Administration of Justice in Muslim Law," p. 79.

might have passed, the Qáẓi is bound to take cognizance of the plaintiff's claim. But the opinion of the jurists of the subsequent period shows that the old idea has undergone a change.[2] The *Sharh-i-Vaqáya*, an authoritative book on Muhammadan Law, says "if the plaintiff does not put forward his claim within fifteen years from the accrual of his right (*istihqáq-i-dáwa*) without any valid cause recognised by *Shara*,' his claim will not be entertained, except the claim for *waqf* and inheritance to which length of time is not applicable. But if there is a lapse of thirty-three years, then the claim in respect of *waqf* and inheritance will not be entertained. Some jurists hold that like all other claims the period of limitation for inheritance is 15 years. Limitation begins to run from the accrual of right. Non-entertainment of suit owing to lapse of time does not lead to the destruction of plaintiff's right ; on the contrary, if the defendant admits the claim, it will be entertained even if a long period has expired."[3]

Period of Limitation.

In Turkey even during the period of the Caliphate the law of limitation was introduced by the order of the Sultán and included in the *Qánun námah, i.e.*, the Code of Imperial Edicts issued by the Sultán on ecclesiastical and secular matters not provided by the Shari'at law. The order is justified on the ground that the Caliph has power under the Islámic law to appoint a Qáẓi vested with the authority limited to

[1] *Radd-ul-Muhtár*, Vol. IV, p. 378.

[2] *Ibid*, pp. 377-9.

[3] *Sharh-i-Vaqáya*, Vol. III, chapter on *Muráfi'at*, p. 52.

the trial of a particular class of cases, his order limiting the power of the Qáẓi not to hear suits if filed after the lapse of certain time, is within his competence. The modern Muslim jurist holds that such order is within the purview of the Muslim jurisprudence.

In India as the Qáẓi used to decide suits in accordance with the legal principles laid down in such books as *Durrul-Mukhtár*, *Radd-ul-Muhtár*, *Sharh-i-Vaqáya*, etc., it may be presumed that the law of limitation must have been the same as stated above from the *Sharh-i-Vaqáya* on the authority of Shámi.[1]

[1] *Sharh-i-Vaqáya*, Vol. III, chapter on *Murafi'at*, p. 52.

SECTION V

Court-Fee and Stamp Duties.

The Islámic law does not sanction the levy of court-fee or stamp duties. Justice was administered free of cost. The underlying idea is that justice should not be sold. The sale of justice is regarded abominable. The cost of maintaining the court and the Judiciary was paid from the Public Treasury. It should be borne in mind that the second Caliph established *Dár-ul-Ifta*, "the Board for Legal Advice" for giving legal opinion *free of cost* to those who sought their help (*vide* Chapter XII, Sec. 3). Such has been the basic principle of dispensing justice.

Afterwards we find that the successful party was required to pay a small portion of the amount of money or value of the property recovered through the court. This was called *Itlaq* which literally means "liberating" or "setting free," and was applied to "fees paid by suitors on the decision of their causes." [1]

In India the custom was to pay *chauth*, *dassatra*, *pachattra*, *i.e.*, a fourth, tenth or fifth part of the property recovered through the court. The terms are of Indian origin, and probably were adopted from the Indian custom. Originally a certain percentage of the value of the property was recovered as fee or commission for summonses, giving delivery of property, or obtaining decision of the court.

The Muslim jurist is averse to levying any fee for the administration of justice. Their view is the same

[1] Field: "Introduction to the Bengal Regulations," p. 209.

as that of Bentham who holds that "Justice shall be administered gratis."[1] Dr. Smith in his *Wealth of Nations* "though averse to making the Administration of Justice a source of revenue beyond the actual cost to the State of the necessary tribunals, was of opinion that this cost might be fairly defrayed by fees of courts. Later Political Economists have, however, contended that even to this extent a tax on justice is indefensible. Those who defend the tax to this extent argue that they fairly be required to bear the expenses of the administration of justice who reap the benefit—*qui sentit commodum sentire debet et onus.* But Bentham replied that they who have to go to law are the persons who do not reap the benefit of good government, since the protection afforded by the law is so incomplete that they have to resort to the courts to maintain their rights against infringement—the benefit is really reaped by those who enjoy such complete immunity from injury that they have never to resort to the courts. It may, however, be said that as, in theory at least, the wrong-doer pays those fees in the end, the courts are really supported by fines inflicted on wrong-doers. In India these fees are all recoverable from the wrong-doer, when he is able to pay them. When he is not, the person who seeks redress is the loser, and here the incidence of the tax is unfair. The Muhammadan system was free from this defect, as the fee was deducted only from the property recovered by the court."[2]

[1] J. Bentham: "Draught for the Organisation of Judicial Establishment," Art. IV.

[2] Field: "Introduction to the Bengal Regulations," p. 209 (Footnote).

SECTION VI.

APPOINTMENT OF LAWYERS IN SUITS.

The Muslim jurists have discussed this subject under the head of Agency (*Vakalata*). The word *Vakil* (commonly known as *Wakil*) is used in the sense of an "agent," "an authorized person to do a business for or on behalf of another person." Vakil, therefore, means a common agent to transact a business for another person, as well as an authorized person versed in law to conduct a suit on behalf of his client.

The law concerning the appointment of lawyers may be generally stated thus: "To appoint an agent is allowable; the validity of appointment of legal agent is based on the text of the Qurân and Hadith; a man can entrust his business to another person, provided he is himself competent to do so; incompetent persons such as the minor, idiot, insane, etc., cannot appoint a Vakil; the agent himself should not similarly be incompetent......It is lawful for a plaintiff or a defendant to appoint any person he likes to conduct his suit, join issues (*khasumat*), argue his case before the judge (*Hákim*) and to transact all other legal business which the party himself could have done in connection with the case." [1] But the law does not recognize agency in torts and crimes.

"The law does not recognize any agency except in so far as it consists in dealing with the rights of the

[1] *Sharh-i-Vaqáya*, Vol. III, chapter on *Vakalata*.

principal, that is to say, there can be no agency in torts and crimes so that the tort-feasor or criminal cannot be heard to excuse himself by saying that he acted as agent of another."[1]

Bahiqi points out that the fourth Caliph (Hazrat 'Ali) used to appoint 'Á'qil as Vakil to conduct cases, and when he became very old, Abdullah bin Jafar Tayár was appointed in his place.[2] The statement of Bahiqi shows that the practice of appointing a Vakil in suits is very old. But the question is whether there was any practice of appointing lawyers on payment of fees to do the business of their clients. On this point Moulána Abdus Salám Nadvi says:

" Although in Islám, a suit can be conducted through a vakil, it is difficult to ascertain from the history of the law-court whether there was any practice of appointing vakils as professional lawyers. In some books it is mentioned that when Isá bin Abbán, a contemporary of Imám Shafy'i was appointed the Qáẓi of Basra, two brothers came to him. They used to appear as Vakils in cases. Apparently it shows that the practice of professional lawyers was in vogue from remote time. This practice is no innovation in Islám."[3]

Qáẓi Tájuddin Abu Nasr Abdul Waháb observes thus:

" The view is this—those Vakils who are lovers of justice, deserve praise, although they charge fees for their labour. But those who desire to encourage

[1] A. Rahim : " Muhammadan Jurisprudence," p. 321.

[2] *Sharh-i-Vaqáya*, Vol. III, chapter on *Vakalata*.

[3] *Al-Quẓá fil Islám*, p. 19.

litigation and defeat the rights of others are liable to condemnation. The duty of the Vakil is to grasp the facts from the client (*Muakkil*), to acquaint himself with the circumstances, and to find out on which side is the truth between the parties...... He should present such documents as he deems to be genuine, or those documents which the client places before him and the Vakil places reliance upon them without the knowledge of the real state of affairs. But if the Vakil after discovering them to be false uses them, his place is in the hell."[1]

Such have been the ideas of the Muslim jurists regarding the profession and duties of the Advocate and Vakil. There is hardly any doubt that the jurists regard them as the priests of justice. It will be seen hereafter how the professional lawyers used to take up the cases of their clients during the Muslim rule in India.

The main idea of the Muslim jurists has been that the parties to suits are the best persons to place their case before the judge. The intervention of a third party (Vakil) and the subtlety of argument of the lawyer for confusing the real issues, or for the purpose of defeating the claim of the opposite party, are not favoured. But when the parties cannot properly state their case to the judge, or get nervous and confused, or are unable to meet the points of law raised by their adversaries, it is deemed desirable to entrust their case to the professional lawyers.[2]

1 *Al-Muqarinát wal Muqabilát*, pp. 51-52.

2 *Ibid.*

SECTION VII.

ARBITRATION.

Tahkim.

The Canon Law of Islám (*Shara'*) allows arbitration between the parties. It is called *Tahkim*. The law confers the right upon the parties to refer their dispute to an arbitrator of their choice. Each party may also select arbitrators of its own and if they agree, the arbitrators so selected may decide the dispute referred to them. The arbitrator has the power to examine witnesses and administer oath like a court, and give award according to the facts of the case and in accordance with the law to which the parties are subject. If the parties accept the award, the decision of the arbitrator will be binding upon the parties and will have the force of a decree. But if a party does not accept the award and refers it to the Qáẓi for its revision (*marafiá*), the latter has the power to interfere and set it aside if the award is not in accordance with the law; otherwise, the Qáẓi will pass a decree in terms of the award.

The Islámic law requires that the arbitrator should possess the qualifications of a Qáẓi on the ground that the arbitrator virtually performs the function of the Qáẓi. No arbitration is allowed in certain criminal matters which entail the specific punishment of *hadd* and retaliation.[1]

[1] *Sharh-i-Vaqáya*, Vol. III, chapter on Arbitration.

A special feature of this branch of law is that a woman may be appointed an arbitrator. Further, a non-Muslim (*dhimmi*) is entitled to appoint a person of his faith as an arbitrator, and in that case the qualifications of a Qáẓi in the arbitrator are not necessary.

CHAPTER X

Qanûn-i-Shahi and *Jus Gentium*

SECTION I.

QÁNÛN-I-SHÁHI.

In addition to the Muhammadan law, we find that there existed a body of laws with which the country was governed and justice was administered. They consisted of the rules, edicts and ordinances issued by the Sultáns and Emperors of India. They were promulgated from time to time for the instruction and guidance of the state-officials and the judiciary. The necessity of promulgating such rules and ordinances arose from the fact that the law and the rules of procedure contained in the books on *Fiqah* (legal treatises) were found either incomplete, or insufficient for the administration of the Empire. Those edicts, ordinances and regulations are to be found in the "Institutes of Taimur," "Áyin-i-Akbari," "Zwábit-i-Alamgiri," "Waqayát-i-Jahángiri" (Institute of Jahángir), "Dastur-ul-'amal" or official handbooks, and Sháhi *Farmáns* detailing the duties and functions of the State-officials. They may appropriately be called *Qánún-i-Sháhi* or the Imperial Edicts. They were the king-made common laws of the country as contradistinguished from the Canon law of the Muslim jurists.

India is not the only country where *Qánún-i-Sháhi* was promulgated and enforced side by side with the

laws of Islám. We find that the Turks had also their Code of Canons called *Qánún-námah* which contains the fundamental laws of the Turks.[1] They are a series of edicts and *farmáns* pronounced by the Sultáns on ecclesiastical and temporal matters not covered by the Muslim law. Those edicts were issued by the Turkish Sultáns in consultation with the *Múfti*, who was the Chief Law Officer of the Crown. The Indian sovereigns adopted the same course and oftner than not issued their edicts and *farmáns* in consultation with their ministers and the law officers of the Crown.

Prerogative of the Muslim Monarch to promulgate Law.

Strictly speaking a Muslim ruler—be he a Caliph or an *Imám*, Sultán or an Emperor, has no power to make law. Consequently, however absolute his power may be, law-making is not one of his prerogatives. His function is to administer law as he finds it enunciated in the *Fiqah*. This is so in theory ; in practice the problem stands on a different footing. We have seen above how the Turkish Sultáns as well as the Indian sovereigns issued *edicts* and *farmáns* which have been incorporated in the *Qánúnnamah* of the Turks and the *Dastur-ul-'amal* of the Indian monarchs.

It may be said that the Sultán or the Emperor did not change the religious laws of Islám ; but changes were made in *secular* laws only. This is true to a

[1] Creasy : "History of Ottoman Turks," p. 152.

great extent. But there are instances which go to show that even some of the Canon laws (*Shara'*) have been either changed or modified. Such changes and modifications are greatly in evidence in the domain of criminal law. If we study closely this branch of the Muslim law, we shall find how from the early age when the four schools of law were founded, down to the end of the Mughal period, the laws of Crime and the measures of punishment underwent changes by the imposition of a series of restrictions and limitations by the Imáms themselves who were the founders of the four schools of the Islámic Jurisprudence.[1]

To illustrate the above point the instructions issued by Sher Sháh and his successor, Islám Sháh, may be cited. "According to al-Badayuni," says Dr. Muhammadullah, "comprehensive instructions on all important points of religion and civil administration were issued to the Sarkars." "All these points were written in these documents whether agreeable to the religious Law or not ; so that there was no necessity to refer any such matters to the Qáẓi or Mûfti, nor was it proper to do so."[2] "Thus we see," says the doctor, "that the administration of Muslim law was being modified to suit the requirements of that age."[3]

A striking illustration of such modifications is to be found in a *farmán* issued by the orthodox Emperor

1 *Vide* discussion of this subject by Shamsul-Ulama Shibli in the *Sirát-ul-Numan*, Part II, pp. 214-215, also A. Rahim : "Muhammadan Jurisprudence," pp. 361-63.

2 *Al-Badáyuni*, p. 496.

3 *Administration of Justice in Muslim Law*, p. 63.

Aurangzib " to the Diwán of Gujrát on the 16th June 1672, which gives his penal code in a short compass." This *farmán* is to be found in *Mirát-i-Ahmadi* (pp. 293-299). A full translation of the *farmán* by J. N. Sarkar is given in his book called *Mughal Administration* (pp. 122-30). The author in the foot-note of page 130 says: " I have translated it as it is. It gives a good picture of the social manners and judicial ideas of the age." The importance of this *farmán* lies in the fact that such an orthodox Emperor as Aurangzib, did not hesitate to issue a *farmán* which contains thirty-two sections of his penal code, although many books of Fiqah containing penal laws existed in his time, especially the *Fatáwá-i-'Álamgiri* compiled under his order by the renowned Ulamás of his time. It may be presumed that the Emperor must have issued the *farmán* in question in consultation with and without any opposition from the Mûftis and Qáẓis of his court. The reason is obvious. The Emperor perceived that the penal laws of the Muslim jurists were crude and insufficient, and did not meet the requirements of the society.

In the domain of secular laws the frequent changes and modifications are greater in evidence. For instance, the changes introduced in the system of land-revenue by Sher Sháh, Akbar and 'Álamgir, the imposition of various taxes and duties on merchandise, the formulation of international laws, the constitution of new tribunals, the appointment of higher judicial officers over the Qáẓi (such as *Mir-i-'adl* and *Diwán*), clearly prove that new laws were made—not under any rule of the *Shara'* but under the pressure of social and

administrative necessity. It further proves that the Muslim jurist and the administrators have never looked upon the secular laws of Islám as unalterable. The orthodox section of the *Faqih* and Ulamá is chary to admit it, and tries to explain away the modifications and changes in law by scholastic arguments. But the fact remains that in India as well as in other Islámic countries there existed and still exists a body of written laws which have been the Common law of the country, and that without such laws its administration could not have been carried on.

As a natural consequence of the enforcement of the Qánûn-i-Sháhi two kinds of tribunals, *viz.*, the Court of Canon law and the Court of Common law, had to be set up in India. Similar has been the history of the parallel courts, and modification of law in other Islámic countries.

Character of the Qánún-i-Sháhi.

From the description of the *Sháhi Qánún* given above, it is seen that these Qánûns (laws) are mostly of a secular nature. They bear the impress of the age. Some of them contain legal excellence and show the wisdom of the framers of those rules. It was the custom and practice of the high officials of the State to charge a newly-appointed incumbent with his duties when granting a *sanad* or letter of appointment. These charges breathe a noble spirit and disclose lofty ideals ; their moral tone is equally high. Further, the instructions issued by some of the Emperors such as Sher Sháh, Akbar and Aurangzib to the State-officials show their administrative ability, ideals of justice and

solicitude for the welfare and contentment of their subjects. To illustrate the excellence and the true character of the customary charges and official instructions I have quoted a few of them in their proper places.

SECTION II.

Jus Gentium OF THE MUSLIM MONARCHS.

Is there such a thing as *Jus Gentium* of the Muslims like the *Jus Gentium* of the Romans? Can the laws relating to non-Muslims (*Dhimmi*) and the *Qánún-i-Sháhi* of the Indian sovereigns and the Turkish Sultáns, be called *Jus Gentium* of Islám? The problem requires a close and critical study of the Islámic jurisprudence and a wide survey of the Rules and Regulations, Edicts and *Farmáns* of the sovereigns of India and other Islámic countries. But this cannot be done within the short compass of this thesis, the scope of which has been limited by the Calcutta University. I have, therefore, indicated above the scope and character of the *Qánún-i-Sháhi* and pointed out in a separate chapter the main features of the laws relating to the non-Muslim subjects under the Islámic State (*vide* Chapter IX).

The occasions and circumstances under which the large body of the *Dhimmi* laws and the *Sháhi Qánún* grew up, were almost the same as or similar to those under which the *Jus Gentium* of the Romans was developed. Their foundations were laid in both cases on natural justice and equity, *i.e.*, *acquitas* of the Roman Prætors, and *'Adl-wa-Istihsán* of the Muslim jurists and sovereigns. When the Muslims carried the banner of Islám beyond the confines of Arabia, they came in contact with diverse races and nationalities. They had their own system of law and well-recognized

customs and usages. The Muslim administrators and the judicial officers felt the difficulty of applying to the non-Muslims the whole of the Muslim law, nor could they adopt the laws and customs of the aliens *in toto.* So the Muslim jurists allowed the non-Muslims to be governed by their own personal law and *well-recognised* customs, and rejected those which stood opposed to the texts of the Qûrán, public policy, or public morality. The Muslim sovereigns and administrators, on the theory of *maslahat-i-ámma* (public policy), and in the interest of the administration itself, as also for the welfare of their subjects, had to issue edicts and ordinances embodying them in their *farmáns,* which supplemented the laws as we find them in the legal treatises of the Muslim jurists.

The laws relating to non-Muslims have been recognised as valid by the Muslim jurists, but the edicts and ordinances promulgated by the Sultáns of Turkey and the Indian sovereigns were not so recognised, although the Mûftis and the Qáẓis accepted them and gave effect to them. In support of this view it may be pointed out that the *Fatáwá-i-'Álamgiri* compiled under the order of Aurangzib, does not contain the rules and *Qánúns* promulgated by that Emperor or his predecessors. Similarly, *Multaka, Majma-ul-Anhár* and other legal works compiled by the Turkish jurists, do not include the edicts of the Sultáns. Those edicts were collected separately in the *Qánún-námah* (Code of Canons). Thus it is clear that the Muslim jurists of the later age, are not prepared to look upon the *Sháhi Qánúns* in the same light as the body of laws relating to *Dhimmis.* This fact militates against the claim

(if there be any) of the *Shâhi Qânûn* to be reckoned as *Jus Gentium* of the Muslims. But the claim of the collective body of laws relating to non-Muslims stands on a higher footing as it has been recognised by the Muslim jurists.

Field in his *Introduction to the Regulations of the Bengal Code* in pointing out that under the Muhammadan Government Justice was administered by two distinct classes of tribunals, *viz.*, (1) those of the Qáẓis and (2) those of the officers of government, observes : "To compare one thing with another, the pure Muhammadan law administered by the Qáẓi was the *jus civile*. The king's officers, like the Roman Prætors, had to supplement this law for Hindus and others for whom it did not provide. The absence of system and the capacity of the times prevented their *jus honorarium* from assuming either in form or substance anything the shape of a new body of *æquitas*."[1]

There is another reason. In the Middle Ages as well as in ancient times, the priestly class—the Pandits, the Rabbi, the Church Fathers and Ulamás, reserved for themselves the prerogatives of dictating law and religion.[2] Under religious colour they desire to perpetuate their monopoly and have always been unwilling to part with their position and powers. The Christian countries have overthrown the thraldom of the Church, and taken legislation in their own hands. But the Eastern countries, with the exception of Turkey, Egypt,

[1] Foot-note, p. 169.

[2] Garner : "Introduction of Political Science," pp. 128-30, on Theocracy.

and Japan, have more or less been under the subjection of priesthood, although the prestige and position of the priests and Ulamás have greatly been shattered for their rigidity of ideas, mediæval mentality and tenacity in conservatism. If the Ulamás recognize the validity of new legislation, their priestly authority will come to an end. This is the main reason, though not the only reason, that they have been averse to new legislation which ultimately lead to the separation of law from religion.

Separation of Law, Religion and Politics.

It should be borne in mind that in the primitive state of society law, religion and politics were regarded as same, and therefore inseparable. But with the progress of human thought, they have been separated and each of them is considered as a distinct branch of science, though inter-related. The theory of the "Divine Right" has long been exploded, and Theocracy does not find favour in any country except in Afghanistan and Arabia and in the realm of the Schoolmen's brain. But it is now recognised that politics has in it the elements of deception, diplomacy and state-craft. It is, therefore, no more a part of religion than the thorn and thistle of the meadow are part and parcel of a celestial body. However, any proposal for preserving the purity and simplicity of religion from the shackles of law and politics, will be opposed by the priestly class with the threat of "the Divine displeasure." The consequences flowing from the combination of law, religion, and politics have

been sad indeed. Religion has been made a handmaid of politics, and diabolical murder has often been glorified into *ghaziism*. Further, if there occurs a difference of opinion on any political matter, the partizans of one school of thought procure saleable *Fatwás* and damn their opponents to perdition in the name of religion. Thus religion has been dragged down from its high pedestal of truth to the low level of diplomacy ; and the wily leaders use the double-edged sword of religion and politics to serve their purpose. The history of the Khilàfat Agitation in India and the expulsion of King Amanullah from Afghanistan are illustrations on the point.

In Islam, law, religion and politics are commonly regarded as inseparable by the Muslim theologians and jurists (*ulámá* and *fuqáha*). The reason seems to be that as they have proceeded from the same source, *viz.*, the Prophet himself, they have been mixed up together. The Prophet was the founder of the religion, the law-giver and an administrator. Consequently, it has implicitly been believed that these branches of science are the same and inseparable. This belief still continues. Not a few among the educated Muslims of the modern times are under the impression that if religion is separated from law and politics, the former will suffer. Their mistake lies in the non-recognition of the fact that the progress of human thought and the study of the history of social, legal and religious evolution of mankind have proved that each of them (law, religion and politics) is a distinct branch of science, though co-related and, to some extent, inter-related, and should be developed and

systematized as such. Every lawyer or jurist, well-versed in the science of modern jurisprudence, cannot but admit that the crude law of the ancient times and the political maxims formulated during the Caliphate in the Middle Ages, can hardly satisfy the growing requirements of the modern states or the progressive human society. This fact has been recognised by all men of liberal education and wider vision. I have, therefore, made the suggestion for separating religion from politics and *secular* law, keeping intact the the religious portion of it. Time is fast approaching when even the credulous classes obsessed with the antiquated ideas of theocracy, will soon come to recognize the utility and necessity of my suggestion. We now hear a faint cry occasionally raised on this subject. But the problem has not yet been tackled boldly. Some writers and publicists have only hinted at the suggestion probably owing to the fear of incurring public odium. However, the problem deserves consideration by the thinking and intellegent section of the public.

CHAPTER XI

Non-Muslims and their Position under Islámic Law

SECTION I.

CODE OF LAWS RELATING TO THE *Dhimmi.*[1]

Department for the Protection of Dhimmis and their Interest.

In order to understand the legal position of the non-Muslims it is necessary to know the views of the Muslim jurists on the subject. I, therefore, proceed to state the law as under :

(1) The Muslims and non-Muslims are equal in the eye of law. " The blood of the *Dhimmi* is like the blood of the Muslim." " In the punishment of crimes there was no difference between the rulers and the ruled. Islam's law is that if a *dhimmi* is killed by a Muslim the latter is liable to the same penalty as in the reverse case." [2]

(2) Aliens obtaining permission from the Muslim Government to reside either temporarily or permanently for the purpose of trade, or carrying on some profession in the Muslim State, is perfectly secure from any

[1] *i.e.*, Non-Muslim subjects under the protection of the Islámic Government.

[2] A. Ali : " The Spirit of Islam," p. 248. This is not an abstract principle of law but is of practical application. Several instances may be cited to illustrate its application. *Vide* cases cited in the foot-note of p. 248 ; also Shibli : *Al-Fârûq*, Part II, p. 127.

molestation till the expiration of the period of guarantee of safety. Such aliens are called *Mustamins*, *i. e.*, persons who have received *aman* or guarantee of safety and protection of life and property. "The *Aman* may be for ever or for a limited duration but so long as it lasts, the Mustamin's treatment is regulated in strict accordance with the terms of the treaty with his country. The *Mustamins* are governed by their own law, were exempt from taxation, and enjoyed other privileges." [1]

(3) *Dhimmis* or non-Muslim subjects of a Muslim State are not subject to the laws of Islám. Their legal relations are to be regulated according to "the precepts of their own faith."

"Zimmis or infidel subjects of the Mussalman power do not subject themselves to the laws of Islám, either with respect to things which are merely of a religious nature, such as fasting and prayer, or with respect to such temporal acts as, though contrary to the Mahomedan religion, may be legal by their own, such as the sale of wine or swine's flesh, because 'we' have been commanded to leave them at liberty in all things which may be deemed by them to be proper according to the precepts of their own faith." [2]

On this principle the Hindus were allowed to be governed by their own laws and carry on their mode of worship according to their religious rites and ceremonies. The Muslim sovereigns, acting on the

[1] A. Ali: "The Spirit of Islam," pp. 176-177.

[2] Baillie: "Digest of Muhammadan Law," p. 174. The command referred to is contained in the *hadith*—"Leave alone the non-Muslims and whatever they believe in."

Hadith which says, " Leave alone the non-Muslims and whatever they believe in," did not interfere with the religious belief and customs of their non-Muslim subjects.

(4) The jurisdiction of the Muslim State over non-Muslims arises from their residence within the State and under its protection.

" The application of Muhammadan law to non-Muslims is entirely territorial, and hence it does not apply to those among them who do not live within the jurisdiction of the Imám." [1]

(5) The *Dhimmi* having accepted the position of a subject in the Islámic State, and the *Mustamin* having received *Aman*, *i.e*, guarantee of protection and safety, both of them are considered to be under the jurisdiction of the tribunals of the Muslim Government.[2] The legal relation of the former is regulated partly by his own law, and partly by the *lex loci*; but that of the latter by his own law as well as the terms of the treaty (*amans*).[3]

[1] A. Rahim : " Muhammadan Jurisprudence," p. 59.

[2] *Al-'A'lamgiri*, Vol. II, p. 357.

[3] " By the articles of peace between Great Britain and the Ottoman Empire, finally confirmed by the Treaty of Peace concluded at the Dardanelles, it is (26th Section) agreed. ' That in case any Englishman or other person subject to that nation or navigating under its flag shall happen to die in our sacred dominions, our fiscal and other persons shall not, on pretence of its not being known to whom the property belongs, interpose any opposition or violence, by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by his will. And should he have died intestate, the property shall be delivered up to the English Consul or his representative who may be there present and in case there be no Consul or Consular

It should be noted that these treaty terms or *Amans* formed the origin of the capitulations which have proved the ruin of the Eastern countries—especially of Persia, Turkey and China,—which have been struggling to free themselves from the shackles of the capitulations.

(6) The secular portion of the Islámic legal code is applicable to the *dhimmi* (non-Muslim) living under the protection of a Muslim State, *i. e.*, "generally speaking so much of it as is in substance common to all nations and not such rules as are specially identified with the tenets of Islám." [1] For example, if a non-Muslim drinks wine, he is not to be punished according to the laws of *Shara'*; if he deals in alcohol and pigs, his transactions are valid.

(7) The Islámic State will not interfere with "such laws and customs of its non-Muslim subjects as have found general acceptance among them, and not the opinions of a few isolated individuals. For instance, if some infidels hold that theft or murder is lawful, the Islámic law will not uphold such doctrines...Except, therefore, when there is a real conflict of law in the sense indicated above, the Muhammadan law relating to punishments and to transactions between men and men applies to the non-Muslim subjects of a Muslim State."[2]

representative, they shall be sequestered by the judge, in order to his delivering up the whole thereof whenever any ship shall be sent by the ambassador to receive them." See case of Maltas *v.* Maltas, Curties, Reports, Vol. III, p. 231.

1 A. Rahim : "Muhammadan Jurisprudence," p. 59.

2 *Ibid*, pp. 252-253.

On this principle the Indian Muslim sovereigns did not interfere with the Hindu customs of widow-burning, polyandry, dedication of girls in temples (*Debadási*), etc.

(8) When there is a reasonable possibility of difference of opinion in different religions concerning certain doctrines of the non-Muslims, the Muslim State will not interfere with the practice due to such doctrines or common usage. The general opinion of the Muslim jurists is that the Muslim law will abstain from interfering with it, but will not lend active support to it.

For instance if a non-Muslim (say a Magian) marries a woman within the prohibited degree as recognised by the Muslim law, the Islámic State will not cancel the marriage, as difference of opinion is possible in different religions as to who are the females within the prohibited degree Similarly, drinking of intoxicating liquor and drugs, sale of wine and pigs, etc., are matters in which difference of opinion exists in different religions.

On such principles the Caliphs as well as the Muslim sovereigns of India did not interfere with many customs and usages of the non-Muslim which, though contrary to Islámic law, or considered superstitious by the Muslim jurists, were practised by them in the Caliphate as also in the land of Hind and Sindh.

In our time we find that the Indian Hindus in Afghánistán have been living there under the guarantee

[1] A. Rahim: "Muhammadan Jurisprudence," pp. 251-252; *Hidáyah*, Vol. I, p. 174.

of protection (*aman*) of the Amir of Kabul. More than twenty thousand Hindus of different castes and sects have become residents of Afghánistán and are carrying on trades and other professions on equal footing with the Muslim inhabitants of the country. They are allowed to perform worship according to their respective religious rites ; they are even allowed to take out processions with music without molestation. Not a few of them are in the various departments of the Afghan Government. Although they are subject to the jurisdiction of the tribunal of the country, in civil matters they are governed by their own personal laws. In criminal matters they are subject to the penal laws of the State, so far as they are applicable to them. In other respects, they are equal in the eye of law (*vide* next section).

SECTION II.

EDICTS AND *Farmáns re* NON-MUSLIM SUBJECTS.

The history of the Islámic Commonwealth goes to show that during the rule of the second Caliph, various races and nationalities came under the sway of Islám. It then became necessary to adjust their relation and frame rules for the protection of their lives and properties. Hazrat 'Umar, the second Caliph, issued various edicts and ordinances in the form of *farmáns* which supplied materials to the Muslim jurists (*Fuqáha*) for developing the Muslim law and jurisprudence. These *farmáns* throw a strong searchlight on the inner structure of the Islámic International Law. They also bring to light the policy and practice of the Islámic States in dealing with their non-Muslim subjects. Many of these *farmáns* have been collected by Imám Abu Yusuf in his celebrated book called *Kitáb-ul-Khiráj*. I quote below a few of them:

(1) " Forbid the Muslims so that they may not oppress the non-Muslims, nor commit any damage to them, nor seize their property without a valid cause, and fulfil all the terms and conditions which you have covenanted with them" (p. 86).

This passage occurs in the *farmán* sent to Abu Ubaida, the Commander of the Army, after the conquest of Syria.

(2) " Guarantee of protection is given to them (non-Muslims) for their lives and properties, and religion and law ; no change will be made in any one of them " (Tibri, p. 65).

These terms were inserted in the treaty of Jurján (Persia). Similar terms were also inserted in the treaties of Azarbaizán, Muqán, Palestine, etc.

Not only did the Caliphs during the Islámic Republic issue such *Farmáns*, but their lieutenants and governors in the conquered provinces, followed the examples of their masters and promulgated similar orders. I shall quote here one such *farmán* to show the spirit of the Islámic sovereignty. The terms of the treaty concluded by Habib-bin-Maslama with the people of Dábil in Armenia ran as follows:

" In the name of God the merciful, the Clement. This is a letter from Habib b. Maslama to the people of Dábil—Christians, Magians and Jews, such of them as are present and such of them as are absent. Verily I guarantee the safety of your lives, properties, churches, temples and city-walls ; ye are secure, and it is incumbent upon us faithfully to observe this treaty so long as ye observe it and pay the poll-tax and the land-tax. God is witness and He sufficeth as a witness." [1]

[1] E. G. Browne : " Literary History of Persia," pp. 201-2.

SECTION III.

Socialistic Principles.

The equality of treatment of the non-Muslims with the Muslims may be conclusively proved by the provisions made for the maintenance of the aged and the imbecile, persons incapacitated by disease or loss of limbs, persons reduced to poverty by sudden calamity, etc. Such persons, whether they were Muslims or non-Muslims, used to get their rations from the Public Treasury (*Baitul-Mál*). This regulation was first promulgated by Hazrat Abu Bakr, the first Caliph. It reveals the strong socialistic feature of the Islámic Republic.[1] The non-Muslim subjects were equally entitled to the benefit of this regulation. The treaty concluded by Khálid-ibnul-Walid after the conquest of Hiratah in Persia stipulated the following terms in favour of the non-Muslims:

"And I give them (non-Muslim inhabitants of Hiratah) the rights that if old persons become incapacitated from doing work, or a calamity falls upon them, or they were at first wealthy but have become poor

[1] The Socialists and the Labourites of the democratic and republican countries of Europe and America, have been crying themselves hoarse for "Old Age Pension," "labour insurance," "provisions for the incapacitated," etc., without much success. But it is really strange that the Islámic Republic made those provisions in the 8th century of the Christian Era without any agitation. *Vide* Shibli: "Al-Fáruq'," Part II, p. 127.

afterwards, and for that reason their co-religionists help them with alms, then they will be exempt from payment of poll-tax; and they and their children will get maintenance from the Islámic Public Treasury (*Bait-ul-Mál*) so long as they will remain in the Dár-ul-Islám (Muslim territory). But if they migrate to a foreign country then the Muslims will not be under any obligation to maintain them.''[1]

Department for the protcction of Dhimmis (non-Muslim subjects) and their interest.—To protect the non-Muslim subjects from molestation, to preserve to them the enjoyment of their religious rights, and to safeguard their interests, the Caliphs of Iráq and Spain created a special Department called *Jihbázah* in Bagdád, and *Diwán-ul-Dhimmi* in Spain.

''In their anxiety for the welfare of the non-Muslim subjects, the Caliphs of Bagdád, like their rivals of Cordova, created a department charged with the protection of the *Dhimmis* and the safeguarding of their interests. The head of this department was called in Bagdád, *Kátib-ul-Jihbázah*, in Spain *Kátib-ul-Zimám*.'' [2]

A critical and comparative study of the Legal History of Islám discloses one peculiar feature of the Muslim jurisprudence which is not to be found in other systems of law and jurisprudence. The Muslim law confers certain legal rights on non-Muslims irrespective of their creed or nationality. According to the Muslim law, a non-Muslim can be appointed

1 Abu Yusuf : " Kitáb-ul-Khiráj," p. 85.

2 A. Ali : " The Spirit of Islam," p. 248.

Executor to the will of a Muslim,[1] servitor or curator (Mutawalli) of a Muslim Endowment [2] (if not connected with the performance of religious functions), an arbitrator to settle disputes, [3] a rector of a Muslim University or an Educational institution.[4] No legal system—either European or Asiatic—has ever conferred such rights on any individual not belonging to its creed or nationality.

Speaking of the treatment and position of non-Muslims under the Islámic law, the author of *The Spirit of Islám* says: "In the later works of law written whilst the great struggle was proceeding between Islám and Christendom on one side for life, on the other for brute mastery, there occur, no doubt, passages which give colour to the allegation that in Islám, Zimmis are subject to humiliation. But no warrant for this statement will be found in the rules inculcated by the Teacher, or his immediate disciples or successors. It must be added, however, that the bigoted views of the later canonists were never carried out in practice." [5] The author supports his remarks by referring to the principles of law, which I have stated above.

I may say, without meaning any disrespect to any class of writers—especially the Muslim jurists—that their bigoted views are due to certain causes,

[1] Baillie : "Digest of Muhammadan Law," pp. 175-176, also p. 626. "Fatáwá-i-'A'lamgiri, Vol. VI, pp. 141-206.

[2] *Ibid*, also A. Ali : " Muhammadan Law," Vol. I, p. 351.

[3] A. Ali : " The Spirit of Islám," p. 249.

[4] *Ibid*.

[5] *The Spirit of Islam*, p. 249.

viz., (1) their want of proper comprehension of the spirit of Islám; (2) their narrow angle of vision; (3) their imperialistic arrogance bred out of the power and official position which they occupied; (4) their vanity of religious sanctity arising from the veneration shown by the common people for their display of bigotry; and (5) the degenerating influence of the age and vicious surroundings.

The author then says: "If the treatment of non-Muslims in Islámic countries is compared with that n n-Christians under European Governments, it would be found that the balance of humanity and generosity, generally speaking, inclines in favour of Islám. Under the Mughal Emperors of Delhi, Hindus commanded armies, administered provinces and sat in the councils of the sovereign. Even at the present time, can it be said that in no European empire, ruling over mixed nationalities and faiths, is any distinction made of creed, colour or race?" [1]

[1] A. Ali: *The Spirit of the Islam*, p. 249.

CHAPTER XII

History of Origin of Certain Institutions

It has been pointed out in Chapter I (p. 9) that the Muslim sovereigns of India adopted for their model certain Institutions which existed in the Islámic countries. I have noticed some of them—especially the tribunals and the judiciary who presided over them. Their designations and functions imply that they had their origin in the institutions which grew up in countries other than India. The student of history—especially the Research Scholar,—will naturally feel inclined to know the history of origin and growth of those institutions on the model of which the Indian tribunals were founded. It should be borne in mind that there were not a few of the administrative and judicial institutions—especially the constitution of the Revenue Department—which were either partly or entirely Indian in character. Some of them were greatly modified and reconstituted according to the needs of the country and requirements of the Indian society. But many a writer[1] on the Indian administration during the Muslim rule make confusion in the description of those institutions. I therefore deem it necessary to give a brief account of some of the important institutions which have a direct reference to India.

[1] *Vide* the description of the *Muhtasib* in Prof. Sarkar's "Mughal Administration," pp. 29-30. He indulges in reckless remarks which are as ridiculous as they are untrue.

I begin with the institution of Qaẓá (justice). The Qáẓi was the most important judicial officer of the Islámic State and played an important part in the sphere of administration of justice. The account of his legal position and functions is given in the next section.

The Qázi

SECTION I.

HIS APPOINTMENT—POWERS—JURISDICTION.

Appointment of the Qázi.

The Qáẓi may be appointed either by the Caliph or the Sovereign direct, or by the Wazir, or by the Provincial Governor vested with the necessary power of doing so. The appointment may be by a written letter or a verbal nomination of the sovereign. It should be accepted by the person appointed and officially announced. The appointment may be general or limited in respect of his authority which affects his jurisdiction.[1]

It is noteworthy that a non-Muslim Ruler or a Wazir or a Governor (if the latter is empowered to do so) may appoint a Qáẓi to administer Islámic Law and such appointment is considered valid under the Canon Law of Islam.[2]

The Qáẓi may be dismissed or deposed by the sovereign, but his dismissal or deposition must be announced publicly. The public announcement is held necessary on the ground that the fact should be made known to the public so that they may repair to him for decision, and may refrain from doing so when he is no longer in office.

The Qáẓi may appoint a Náib or deputy Qáẓi only if he is empowered to do so ; he can also dismiss

[1] Máwardi : " Ahkám-ul-Sultányah," pp. 114-116.

[2] A. Rahim : " Muhammadan Jurisprudence," p. 388.

him. The death or dismissal of the Qáẓi does not affect the appointment of the Náib Qáẓi.[1]

"The Qáẓi holds his office at the discretion of the Sultán who may dismiss him on suspicion or even without suspicion. Abu Hanifa says that a Qáẓi should not be allowed to hold office more than a year. On the death of a Sultán, however, the Qáẓi does not, according to accepted opinion, vacate his office."[2]

Powers and Jurisdiction.

It has already been noticed that the appointment of a Qáẓi may be general or limited. The Qáẓi vested with general powers has extensive jurisdiction in respect of areas and the class of cases he has authority to try. Máwardi enumerates the duties of the Qáẓi with general judicial powers.[3] I refrain from mentioning them as they may appear dry and uninteresting with the observation that as regards infringement of religious laws he has complete jurisdiction over them, and can try cases involving the questions of claims and rights of inheritance and succession, matrimonial disputes, etc., but as regards Municipal laws, the Qáẓi can only take action when the complainant appears before him with his complaint.

As regards the Qáẓi with limited powers, he can only exercise his jurisdiction over the duties as specified in the letter of appointment. He can only

[1] *Sharh-i-Vaqáya*, Vol. III, book on the Administration of Justice.

[2] A. Rahim: "Muhammadan Jurisprudence," p. 390; also "Fatáwá-i-'A'lamgiri," Vol. III, p. 390.

[3] *Vide* Máwardi: "Ahkám-ul-Sultányah," pp. 123-28.

decide cases of debts or cases which can be settled on admission. But he has no jurisdiction over cases involving questions of marital rights and other civil disputes.

" A Qáẓi may be appointed for a limited time or with jurisdiction over a particular area. Similarly, a particular class of cases may be excluded from his jurisdiction, or he may be empowered to try only particular classes of cases. For instance, a Qáẓi may be prohibited from hearing cases instituted after the lapse of a certain ṭime, or he may be appointed only to hear cases arising in the army or in any particular division of it." [1]

Two Qáẓis may be appointed to try a particular case or a particular class of cases. When two Qáẓis are so appointed, they must act conjointly; otherwise their decision or the decision of one of them will be vitiated. They will sit together and form a bench akin to the Divisional Bench of the High Court.

[1] A. Rahim : " Muhammadan Jurisprudence," p. 389.

SECTION II.

DUTIES AND POWERS OF THE QÁẒI IN THE EXERCISE OF HIS JURISDICTION.

(1) " A Qáẓi in deciding a case must follow and cannot act contrary to the law laid down by a clear text of the Qurán, or of a universally accepted or well-known tradition, or by a consensus of opinion (*Ijmá*)."

" Any decision of his opposed to such certain and absolute law must be set aside by himself or by the succeeding Qáẓi when the error is discovered. But otherwise, his decision cannot be set aside by another judge or by himself, although the view of law on which it is based is erroneous."[1]

(2) " When a question depends upon juristic deduction a Qáẓi belonging to one School of Sunni Law, such as the Hanafi, may decide it according to the Shafe'i law, if he prefers that view, or he may make over the case to a Shafe'i Qáẓi for decision, if there is one available."[2]

(3) Subject to the restrictions stated in para. 1 " a Qáẓi is free to make his own deductions in matters of juristic law" and may decide a suit on analogical deductions in consonance with the principles of equity and justice.

[1] A. Rahim : " Muhammadan Jurisprudence," pp. 179-181.

[2] *Sharh-i-Vaqáya*, Vol. III, chapter on *Al-Qaẓá*; also Vol. IV, pp. 396-98.

Al-Káshani states the principles thus in the *Badáya*:

"Where there is neither written law nor concurrence of opinion (*ijma'*) for the guidance of the Qáẓi, if he be capable of juristic deductions and has formed a decisive judgment in the case, he should carry such judgment into effect by his order, although other scientific lawyers may differ in opinion from him, for that which upon deliberative investigation, appears to be right and just is accepted as such in the sight of God."

(4) If a Qáẓi happens to be deficient in the science of jurisprudence or feels diffident in applying law to a point in dispute, he is entitled to consult a competent jurist, or refer it to him for his opinion.

Fatáwá-i-'A'lamgiri observes: "If in any case the Qáẓi be perplexed by opposite proofs, let him reflect upon the case and determine as he shall judge right, or for great certainty let him consult other able lawyers, and if they differ after weighing the argument let him decide as appears just." [1]

We therefore, find that a Mûfti was often attached to the court of the Qáẓi to help him with legal opinion. It was a salutary rule meant to avoid miscarriage of justice on a point of law.

(5) If a Qáẓi is well-versed in jurisprudence, and capable of making analogical deductions (*ijtihád*) he may draw his own conclusions and apply the results to the facts and circumstances of the case and pass judgment accordingly.

[1] *Fatáwá-i-'Álamgiri*, Vol. III, p. 383.

On this point the author of *Muhit* says: " If none of the authorities is forthcoming and the Qáẓi is a person capable of making analogical deduction (*Ijtihád*), he may consider in his own mind what is consonant to the principle of right and justice and apply the result with a pure intention to the facts and circumstances of the case, and should pass judgment accordingly."

Quasi-judicial Duties of a Qáẓi.

In addition to the judicial duties of the court a Qáẓi vested with the general authority is required to do the following quasi-judicial works:

(1) Supervision, management and administration of Trust Properties, such as *Waqf*.—Although the powers of the Qáẓi are more comprehensive under the Muhammadan law than those of a Mutawalli or trustee and the Qáẓi had to protect such properties from waste and misappropriation, it appears that he seldom interfered with the management of such endowments by non-Muslims. The Muslim rulers of India adhered to this policy leaving the Hindus to manage their own endowments and trust-properties attached to their temples.

(2) Supervision and protection of the properties of minors, lunatics, and idiots.—The Qáẓi has also the powers to control the acts of their guardians. If such persons have no guardians, the Qáẓi may appoint one for the safe custody of their person and property;

if necessary, he may give a minor in marriage.

(3) Appointment of an administrator for preserving and looking after the property of a deceased person, if his heirs are absent in a foreign country, or if they or some of them are minors. The Qáẓi has also the power to protect the property of a missing person.

(4) Supervision of subordinate Qáẓis and the law-officers called *Shohud* (public notaries) and the secretaries called *Umana.*

(5) Leading the congregation and presiding over the Friday and Id prayers.—This is the religious duty and the most important office of the Qáẓi. This is the main reason why a non-Muslim cannot be a Qáẓi.[1]

Mûfti—his Office.

The Mûfti is a learned jurist. None can be a Mûfti unless he is well-grounded in law and jurisprudence, and knows the legal precepts and precedents. He is appointed by the State to advise and assist the Qáẓi with the exposition of law. He is the law-officer of the Crown. Whenever any difficulty arises on any matter concerning law, or legal procedure, the Mûfti is asked to expound the law or to point out the procedure to be followed. This wise step was adopted by the Caliph to avoid miscarriage of justice. During the Muslim rule in India, a Mûfti was attached to

[1] For the whole of this chapter *vide* *Fatáwá-i-'Álamgiri*, Vol. III, pp. 418-20; also *Sharh-i-Vaqáya*, Vol. III, chapter on *Al-Qaẓá.*

every court of the Qáẓi ; and when the Emperor held the royal court, the Mûfti and the Qáẓi were required to attend it. The position of the Mûfti was higher than that of the Qáẓi.

The term " Mûfti " means a person who is competent to give *fatwá* or legal opinion. He does not represent any party to litigation, nor expound the law from the point of view of his client. The Mûfti cannot, therefore, properly be called the Advocate-General, or the Government Advocate, or the Government Pleader who invariably represents a party, *viz.*, the Crown. Under the Muhammadan judicial system the duty of the Mûfti was not to support the case for the Crown, but to expound law correctly and express his legal opinion freely. He is, therefore, " the priest of justice " in the true sense of the term.

Dár-ul-Iftá.

During the early period of the Islámic Commonwealth the second Caliph (Hazrat 'Umar) established an institution called *Dár-ul-Iftá*, " the Board of Legal Advice," for giving correct opinions on law and juristic principles. A number of well reputed jurists were selected for this Board. They were under the supervision of the State, and enjoined to express legal opinion *free of charge* to those who sought their services. The object of the Caliph in establishing this Board seems to have been—(1) to avoid the plea of ignorance of " the laws of the land " ; (2) to put down the spread of incorrect *fatwás* or legal opinions of Ulamás (theologians) not well-versed in jurisprudence ; (3) to help the common people with legal

advice free of cost.[1] His strict injunction was that none but those who were selected and nominated for this Board, were entitled to express opinions on law points or to issue *fatwás*, be they religious or secular. This institution exercised a healthy influence and put a wholesome check on the vagaries of the judiciary and the theologians. It also gave an impetus to the development of law to some extent. For those who desired to be nominated, had to pay greater attention to the study of jurisprudence, and those who were actually selected, had to be careful in expressing their opinion for fear of hostile criticism and loss of position and reputation.[1] It does not appear when this institution was abolished. But it may fairly be presumed that the Mûfti was a product of this institution.

The Muslim sovereigns of India did not establish any *Dár-ul-Iftá*, but they appointed Mûftis to assist the court in the administration of justice.

Since the grant of the Diwáni when the English agents took over charge of the administration of justice, they retained the services of the Qáẓi and the Mûfti. In 1793 Lord Cornwallis established a gradation of courts of appeal. Although the European Judges presided over them, they employed a Qáẓi, a Mûfti and a Pandit to advise them, just as the Muslim Emperors used to do. This system was abolished in 1864. The result of abolition has not been free from difficulty. In the case of *Khâwja Hasan Ali* v. *Hazari Begum* (12 W. R. 344) Markley J. observed: "As I have to point out presently, the means of discovering

[1] Shibli: "Al-Fárûq," Part II, pp. 56-57.

the Muhammadan Law which this court possesses are so extremely limited that I am glad to avail myself of any mode of escaping a decision on any point connected therewith." Other Judges have made almost similar observations in pointing out the difficulty in applying Hindu Law.

Under the British system of administration of justice, two Judges decide an appeal on a point of law in a Division Bench of the High Court only. But under the Muslim system, every court had two—sometimes three—officers to hear a case whether original or appellate.

Qáẓi-ul-Quẓát.

The Qáẓi-ul-Quẓát, *i.e.*, the Qáẓi of Qáẓis, the Chief Qáẓi, was the Chief Judicial Officer, and his court was the highest court of justice in the Caliphate. It was generally situated at the capital, but in Spain there were four courts of the Chief Qáẓis in the reign of Abdur Rahmán I. In Spain the Chief Qáẓi was also called the *Qáẓi-ul-Jamát.*

The court of the Qáẓi-ul-Quẓát was the chief appellate court in addition to the court of the Caliph who also used to hear appeals. The Chief Qáẓi sometimes used to decide original suits also. But his main function was to hear appeals from the subordinate courts.

This court was first established by the Caliph Hárun-ur-Rashid. Imám Abu Yusuf, one of the chief disciples of Abu Hanifa, was appointed the Chief Qáẓi of Baghdád. Since then the office has been retained in all Islámic countries.

In India the Muslim sovereigns also established the court of the Qáẓi-ul-Quẓát and appointed the Chief Qaẓi not only in the Capital, but also in some of the provinces (*vide* Chapter V, pp. 63-64).

The historian Maqrezi gives a vivid account of the Chief Qáẓi's court, a summary of which is given below:

The Caliph having the absolute authority over the State entrusts a person with the office of the Qáẓi under the designation of Qáẓi-ul-Quẓát. His rank and position are superior to all "the people of learning."

Description of the Chief Qázi's Court.

All matters concerning religion are within his powers and jurisdiction. He holds his court generally on Saturdays and Wednesdays. He sits on the silken *masnad*. On the dates fixed for hearing, the witnesses of the parties sit on his right and left. Five orderlies are attached to his court, and remain standing near him. Two of them take their stand at the entrance of the witness-box (*maqsurah*). One of them brings the parties before the Chief Qáẓi. Four scribes who record proceedings, are attached to his court. They sit in a group of two before and near him. A desk with a silver inkpot is supplied to him from the treasury. A special officer carries it to him. A mule of red (*shahábi*) colour is daily sent to him from the royal stable for bringing him to the court......On ceremonious occasions he is presented with garland (*tauq*) and golden robe (*Zarrin Khilat*)...When he sits in the court the peons and orderlies conduct the parties before him. No military or executive officer can proceed before him...Nobody is allowed to leave the court

without his permission ; no examination or cross-exa mination of the witnesses can be made without his order. On Monday and Thursday he sits in his *mahal* for performing obeisance to the Caliph, while his *naib* (deputy) decides cases. The officer (*vakil*) in charge of the *Bait-ul-mál* (public treasury) attends his court. He (the Chief Qáẓi) also inspects the records of mint ; he himself closes the mint and puts his seal upon it. He remains present at the time of opening it.[1]

The Chief Court of Judicature (*Dár-ul-'Adl*).—This court was first established by Nur-ud-din Mahmud (1174). " A regular High Court of Justice, however, was not established until the time of Nur-ud-din Mahmud. He instituted for the first time the *Dár-ul-'Adl*, locating in one place the different courts and organised and improved the Judiciary which had seriously deteriorated in the decline of the Caliphate." [2]

Dár-ul-'Adl.

The author of *Al-Qaẓáta fil Islám* [3] gives certain reasons for the establishment of the *Dár-ul-'Adl*. He says : " Although the courts of Qáẓis were considered sufficient for the decision of cases of the ordinary people, there was no court for the trial of the officials... But when some *Ameers* oppressed the people at Damascus, the Sultán Nuruddin established a permanent court called *Dár-ul-'Adl* in which were tried those Viziers and Ameers who committed oppression upon the subjects. The *Dár-ul-'Adl* was the first court of judicature which was established in Islám." [4]

[1] Maqrezi, Vol. II, p. 246.

[2] Amir Ali : " History of the Saracens," p. 423.

[3] *Vide* his pamphlet, pp. 13-14.

[4] *Vide* " Muházirat-ul-Awáil," p. 83.

In India the Muslim sovereigns (Tughlaq and Mughal) established the courts of the *Mir-i-'Adl* (the Lord Justice or Chief Justice) as well as the courts of 'Adl (Civil Judge) who ordinarily dealt with the revenue cases, unless otherwise empowered to decide civil suits.

Nazr-ul-Mazálim.

Board for the Inspection of Grievances (Nazr-ul-Mazálim).—This was the highest criminal court of justice and exercised control over the administration and judiciary. "The function of this institution was to set right cases of miscarriage of justice which occurred in the administrative and judicial departments, and further to take cognizance of petitions based upon miscarriage of justice."[1]

Diwán-ul-Mazálim.

"Criminal justice was apparently in the hands of magistrates called *Sáhib-ul-Mazálim*. But the highest tribunal was the "Board for the inspection of Grievances," *ad Diwán un-Nazr fil Mazálim,* which was presided over by the sovereign himself or in his absence by one of his chief officers. The other members of this Board were the Chief Qáẓi, the Hajib, the principal secretaries of the State, and some of the muftis or jurisconsults especially invited to attend. The establishment of this court was rendered necessary by the difficulty of executing the decrees of the Qáẓis when the defendant was of high rank or employed in the service of Government. None dared disobey a citation before

[1] S. Khuda Buksh : "Organism of the Muslim State" translated from Von Cremer's *Culturgeschichte des Orients.*

this court and none were powerful enough to escape its severity."[1]

According to Amari this institution struck the imagination of the European monarchs, and "struck root even on European soil." King Roger, the Norman ruler of Sicily, accepted and established, among other Arab institutions, this Board of Inspection (Dár-ul-Mazálim) in his kingdom.[2]

According to Von Cremer, the office of the Dár-ul-Mazálim consisted of (1) court ushers for summoning the parties and maintaining order ; (2) judges and administrative functionaries for discussing legal arguments and judicial procedure ; (3) men learned in law for solving serious questions of law ; (4) recorders to certify judgments and directions of the courts."

In India the Emperor Aurangzib established *Diwán-ul-Mazálim* " the Court of Inquiry into Oppressions." The reason for establishing this court seems to have been the same which induced the Caliph to establish *Nazr-ul-Mazálim* as stated above.

Muhtasib.

Al-Hisbah, the office of the Prefect of Police.— The Prefect was called *Muhtasib* and " held an intermediary place between the judiciary and the board for inspection of grievances." This institution (*Al-Hisbah*) can hardly be called a court of justice as

[1] Amir Ali : " History of the Saracens," pp. 22-23.

[2] Amári, III, p. 445, also Von Cremer: *Culture under the Caliphs*, Also *vide* Máwardi, pp. 134-35.

the officer (*Muhtasib*) was not ordinarily vested with judicial powers.

Muhtasib.

Regarding *Al-Hisbah* Amir Ali writes: "The Municipal police was under a special officer called the *Muhtasib*. This useful and important office was created by the Caliph Mehdi and has existed ever since in Islamic countries. The *Muhtasib* was both superintendent of the markets and a public censor. He went through the city daily, accompanied by a detachment of subordinates and assured himself of the due execution of the police orders, inspected the provisions, tested the weights and measures used by tradespeople, and suppressed nuisances. Any attempt to cheat led to immediate punishment. Abul Hassan al Mawardi, 'the Hugo Grotius of Islamic public law,' after describing the extent and limits of judicial and executive authority, says that the police (*hisbat*) stands half-way between judicial utterances and the application of executive force. 'The duties of the police,' he says, 'are circumscribed within the limits imposed by law, to enforce what is incumbent and to prevent from committing what is forbidden when it comes into prominence.'"[1]

After describing the duties of the Prefect of Police S. Khuda Bukhsh observes, "we must note, however, that the *Muhtasib* only interposed upon application of the party and was not competent to adopt coercive measures as he had no judicial power. It was no part of the duty of this officer to decide judicial matters unless the accused confessed his guilt and was in a

[1] "History of the Saracens," p. 420.

position to carry out his obligation or to repair the injury caused by him. It did not lie within his power to adopt a judicial procedure. Different it was, indeed, when he had received express authority ; in which case he continued the functions of a Muhtasib and a judge.

"The rule generally obtained that when the accused denied his guilt or questioned his liability, the jurisdiction of the Muhtasib ended and that of the Kadhi began, for in such cases witnesses had to be heard on oaths administered and evidence tested. We see how carefully and precisely the sphere of different offices was defined to avoid a conflict of authorities." [1]

The Muslim Emperors of India retained this office intact, and the Muhtasib played an important part in the administration of the country during the Muslim sovereignty in India. I have already pointed out the threefold duty of the Muhtasib (*vide* Chap XI, pp. 54-55).

[1] *The Organism of the Muslim State*, by S. K. Bukhsh; published in the Journal of the Muslim Institute, 1907; Mawardi : "Ahkám-us-Sultanyah," pp. 404 *et seq.*

SECTION III.

LEGAL POSITION OF WOMEN.

One of the most striking features of the Islámic Law is that it confers upon women the right of holding the office of a Qáẓi or Judge. Abu Hanifa holds that a woman can act as a judge only in those cases in which her evidence can be legally taken. This restriction has been imposed on the ground that no one can be appointed a Qáẓi unless he possesses the qualifications of a witness. But a woman according to the Canon Law is not competent to be a witness in cases involving the specific punishment of *hadd* and retaliation. Therefore she is not competent to pass orders in certain cases; otherwise, she is fully competent to exercise the functions of a judge. Abu Jarir Tabári maintains, on the contrary, that a woman is quite competent to hold the office of a judge in all cases. The above are the views of the Hanafite jurists. But the Shafay'is hold that a woman is altogether disqualified to hold the office,[1] as according to the Shafay'i school, a woman is always under *patria potesta*.

It should be remembered that the later Muslim Casuists and narrow-minded jurists, most of whom are

[1] *Sharh-i-Vaqáyah*, Vol. III. Máwardi: "Ahkám-ul-Sultaniah,' chapter on Appointment of Qáẓi.

mere commentators, have tried to cut down the rights of women on various pretences ; but has not succeeded in their efforts. The democratic and socialistic ideas of Islám have been so deep-rooted that they could not deny the rights conferred by the law upon women, and had to acquiesce in it with a quaint remark that women are legally competent to hold the office of a judge, but " it is sinful to appoint them! " [1] Such ideas clearly show the influence of patristicism and mediaeval mentality. Yet the women of Islám have been enjoying their rights and privileges conferred upon them by law on an almost equal footing with men.[2]

Fourteen centuries before, Islám conferred upon women those rights and privileges which the other systems of law have denied to them. The struggle for female franchise in India, Europe and America, the denial of legal privileges to the educated women of the modern times as in the case of Regina Guha and her unfortunate sisters, the Suffragette movement resulting in the Sex Disqualification Act of 1920, the appointment of female jurors in American and Magistrates in England in the first quarter of the twentieth century, show that the Prophet of Islám had a deeper insight and bolder conception of women's legal rights in that remote age. They are in accord with the democratic-socialistic spirit of Islám.

1 *Sharh-i-Vaqáyah*, Vol. III.

2 Amir Ali : " History of the Saracens," p. 69.

Under the Islámic law, women can be—

Women's legal rights.

(1) a Caliph or sovereign of an empire ;[1]

(2) a Councillor or member of a Municipal and Legislative body ;

(3) an executor or administrator of an estate ;

(4) a Mutawalli of an endowment ;

(5) a rector of a University or an educational institution ;

(6) a jurist, judge or an arbitrator ;

(7) a Vakil (authorized agent) in law-suits and for transacting business.

(8) She has right of inheritance and succession in the same way as a man has under the law ;

(9) can acquire and hold property in her own right ;

(10) has absolute power of disposal over the inherited and self-acquired property ;

(11) possesses the right of voting at an election ;[2]

" The rights of women over men are precisely the same as the rights of men over women."—*Qúrán*.

CONCLUSION

I have given a sketch of the judicial system which was in force during the pre-Mughal period, as an

[1] Opinion is divided on this point. Some jurists (Faqih) insist on male sex as a qualification, others do not. A section of the *Kharijites*—the sect of the Shabibiya—elected a woman as their Caliph. Razia Begum was the Empress of India, and Chand Sultana ruled Ahmadnagar in India.

[2] For a fuller account *vide* A. Ali : " The Spirit of Islam," Chapter IV, " The Status of Women in Islam," especially, pp. 214-16, " The History of the Saracens," pp. 69, 198-200, 445-46.

introduction to the system that was adopted and greatly improved by the Mughal Emperors. I have also given a short sketch of the administration of justice in the time of the later Mughals up to the grant of the Diwáni of Bengal, Behar and Orissa. A comparative view of the Muslim Courts and the British Courts of justice has been added to enable the reader to appreciate their respective merits and functions.

It cannot be denied that the judicial system of the Mediaeval Age had its merits and demerits, just as the present system has its advantages and disadvantages. Consequently, we shall hardly be justified in condemning the one and applauding the other. Each age has its ideals of justice and standard of punishment, just as each age has its standard of morality, its measure of judging social evils, and its method of removing socio-political abuses. But there is hardly any doubt that the present judicial system is highly improved, more definite and regular, and more efficient. At the same time it must be admitted that it has its defects too. It is very dilatory, expensive and cumbrous. The practising lawyers know how the courts are infested with "the cormorants of law." The litigant public have had the bitter experience of the ruinous effects of costly litigation. The British system of justice, no doubt, affords certain facilities to litigants, but often involve them in debt and ruination. Had it been free from these defects, it would have been an ideal system.

If we compare the British system of justice with that of the Mughal period, we find certain striking features in the contrast. They are inherent in the

very nature of the British administration. Confining myself strictly within the scope of the thesis, I may mention a few of them:

Opportunity for comparative study of legal science.

(1) The British administration affords ample opportunity for a comparative study of Law and Jurisprudence. Now we do not only study our own law, but we get free scope for studying different systems of jurisprudence. Neither the Hindu king nor the Muslim monarch cared to establish an institution for the study of the foreign systems of jurisprudence; neither the learned Ulamás nor the philosophic Pandits have ever entertained such an idea. On the contrary, they will even now stoutly repudiate the proposal (if it is made) of teaching the foreign system of jurisprudence in the *Madrasah* or *Tol.*[1]

Theocratic Exclusivism.

(2) The British system of administration has demolished the stronghold of the *Theocratic Exclusivism.* This idea has been very strong with the hierarchy of theology. The history of the Caliphate is replete with the instances of conflict between the State and the Islámic Church. In India this conflict prevailed for some time but it gave way from time to time to some extent. Conflicts arose when Muhammad Tughlaq, Sikandar Lodi, Ibráhim Lodi, Sher Sháh, Akbar and others tried to break down the theocratic exclusivism. They succeeded in varying degrees, but patristicism got the upper hand on the death of each of those monarchs.

[1] The Hindus and Muslims of India have shown strange mentality in respect of the study of other sciences also. Take medical science. The

The consequences of the theocratic exclusiveness have been, among others, to keep reason and the spirit of free inquiry in the bondage of patristicism. This may be illustrated by the following historical facts.

Centuries of contact of the Muslim jurists with the Romans did not even create a desire in their mind to know the excellence of the Roman Law and Jurisprudence. Centuries of contact of the Pandits with the Muslim jurists who sat together in the court of justice, did not induce the one to learn the legal system of the other. Each race extolled its own system and remained satisfied with its vanity and religious conceit. This is the effect of theocratic exclusivism which is being swept away by the impact of the West. It is now recognized that Law is a distinct branch of science and that legal treatises must be revised and written on "the scientific system of thought."

Power of Legislation.

(3) Another benefit of the British Administration has been the conferment of the power of legislation upon the people of India. It has broken down the monopoly of law-making. Legislation is no longer in the hands of *Manus* or *Mobeds*, nor with the Mediaeval jurists of Irán and Turán. It is now in the hands of the

A'yurvedic and Yunáni systems are the same. The Hakim studies the healing art of the Hellas with avidity, but looks askance at the A'yurvedic system. On the other hand, a Kabiráj will not touch the Hakim's book with a pair of tongs. There are no doubt some excellent medicines in both systems, but one does not care to know the method of the other for preparing them. What inestimable boons they could have conferred upon the suffering humanity by a comparative study of these healing arts!

people themselves. Law is no longer considered a handmaid of theology ; legislation has been freed from the shackles of the *Shara'* and *Shástra*. The Muslim States of Egypt, Turkey and Persia (to some extent) have recognized the power of the State to make laws for their Governments. The Native States of India follow the example of the British Government and legislate for their subjects. This is decidedly a step towards national advancement.

(4) The Muslim monarchs took the Perso-Arabic system as their model; the British system in India is based on the English model. But the constitution of the British courts of justice is founded on the Parliamentary Statutes; while the Muslim courts were established by the Royal *farmáns*, there being no parliament or legislative body at that age. Both systems have been in Indian setting, and strongly leavened with Indian elements. But the advantage of the British system is that the powers and jurisdiction of each court have been clearly defined by legislative enactments ; while those of the Islámic courts depended more or less on the individual opinions of the jurists and the sovereigns.

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